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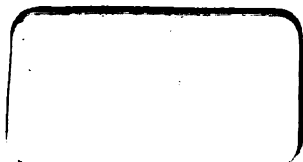
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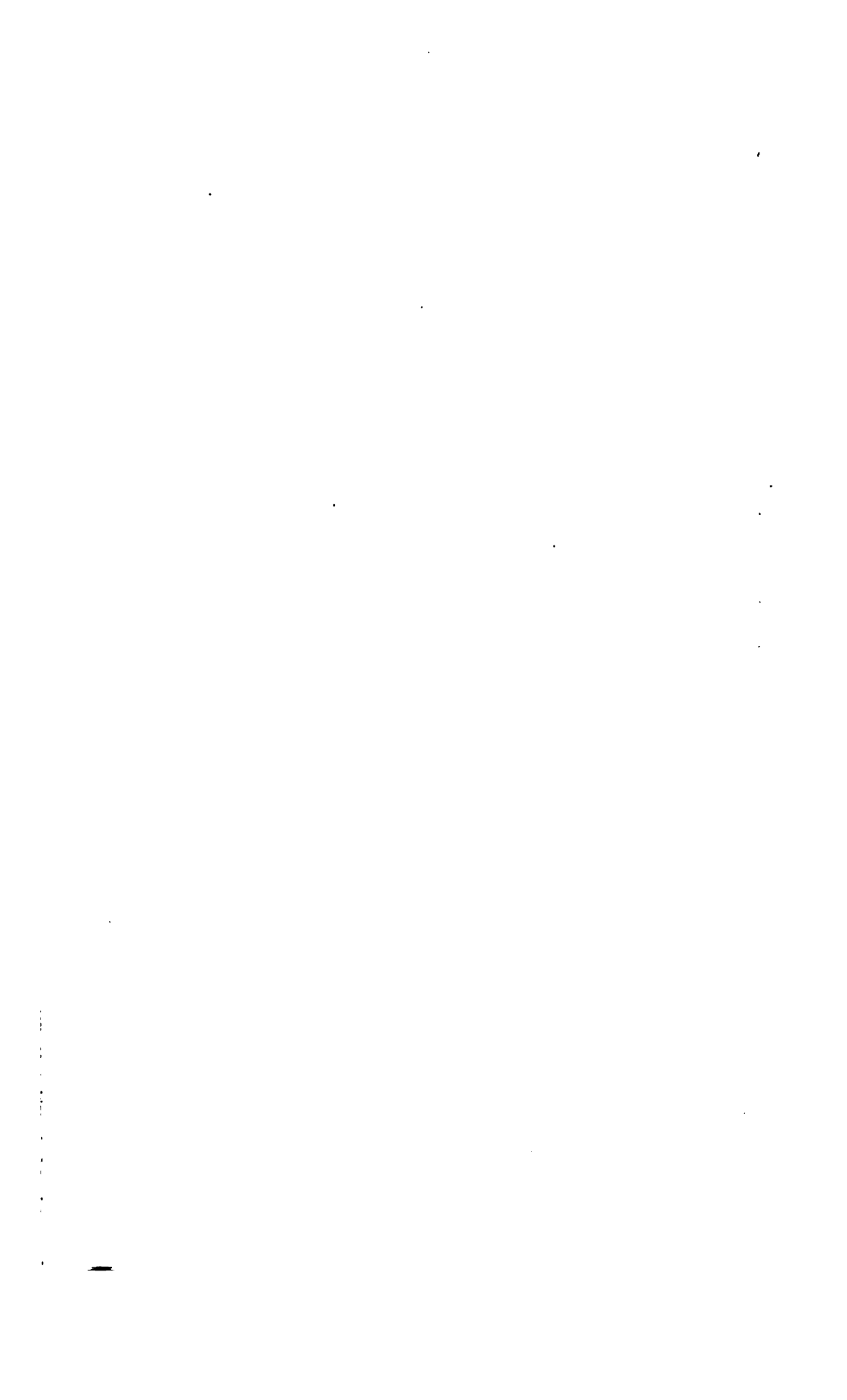
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•

PREFACE.

THIS work is intended to be a compilation of those branches of Law in which Architects and Surveyors are interested, and which they have occasion to refer to in the practice of their professions. This will account for the present book including some subjects which are more copiously and perfectly treated of in other legal works, such as the Law of Highways and Sewers.

In the Introductory Essay I have attempted a sketch of the whole subject of the Treatise, showing the general points of resemblance and difference between its parts. In the body of the work, my design was to state the different Rules of Law inducible from the Cases, and to abridge the Cases illustrating and establishing the Rules in chronological order; and on points where decisions have been conflicting, to state them on both sides, in the same order. By this means the reader can judge for himself whether the law is fairly stated, and will the better understand it by seeing the reasons on which it is founded and the Cases in which it has been applied. This plan I have been unable fully to carry out from want of leisure; but it will be found that the first chapter and the greater part of the second have been compiled according to it.

Although in the preparation of this work I have derived great assistance from many valuable legal text-books, (Burn's Ecclesiastical Law,—Rogers's Ecclesiastical Law,—Amos and Ferard on Fixtures,—the Notes of the Editors of Saunders to

Green v. Cole, — Platt on Covenants, — Viner's Abridgement, and Comyns's Digest,) and have not referred to them in the foot notes, it has not been from any wish to conceal my obligations to those excellent works; but out of regard to those who may refer to this book for the purpose of ascertaining the law. I have used the works mentioned as stepping-stones to the Cases by which the law is evidenced; and I know how wearisome it is, when searching for a point of law, to be referred from text-book to text-book before the Case on which the law is founded is reached.

The first edition has been for some time out of print. I have bestowed as much pains as I could in the preparation of this edition, which I hope will be found an improvement on the former one. To the first and second chapters I have not only added the Cases decided since the first edition was published, but have also thoroughly revised both those chapters, and rewritten the greater part of them, giving a more explicit and accurate account of the authorities formerly referred to. To the other chapters I have been able to do little more than incorporate the recent Cases and Statutes. In the Chapter on Party Walls I have omitted the Cases decided on the old Building Act which have been rendered obsolete by the new Building Act. I have altered the arrangement of the chapter on Nuisances, and omitted some parts which appeared to me foreign to the subject.

Temple,
21st May, 1849.

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INTRODUCTION.

WHEREVER there is a right to use lands or houses, questions arise as to the manner in which they ought to be used, and by whom dilapidations, whether caused by accident or decay, ought to be supplied. The rights of parties with respect to immoveable property so closely border on each other, and the line of demarcation between them is so indistinct, that one man, in the fancied exercise of his right, is continually liable to encroach upon or disregard the right of another. No person, however absolute his property in land, can put it to any use he pleases; his right to use is restrained by the rights of his neighbour; he is bound to take care that his manner of using does not interfere with the inoffensive and profitable occupation by his neighbour of his land. Questions as to the mode in which lands should be used may arise, either between parties who have different rights to the same land, and between whom there is a privity or connection of interest, as between landlord and tenant, tenant for life and remainderman, or incumbent of a benefice and his patron or successor, or between parties who are strangers to each other in respect of the land used, as the occupiers of two adjoining tenements. In cases where there is a privity in respect of the land, every defect in the condition of the land or house is termed a dilapidation, and the act or default of the tenant causing or permitting such defect is termed waste: in cases where tenements, from misuser or defect of repair, become injurious to a stranger,

Distinction between Dilapidations and Nuisances.

the act or default of the party is termed a nuisance. The law of dilapidations and of nuisances both depend upon the maxim, "Sic utere tuo ut alienum non lædas;" and the difference between them is, that in the case of dilapidations the *tuum* and *alienum* are different rights to the same thing; and to ascertain the nature and extent of the obligation, we must inquire how far the right to use is limited and qualified. In the case of nuisances, the *tuum* and the *alienum* are different things, and the inquiry is as to the extent of the possessions or privileges of the party complaining of the nuisance. Thus, if a landlord complain that his tenant has dilapidated the premises leased, he must prove that the dilapidations in question are such as either the general nature of the tenure or the particular stipulations of the lease oblige the tenant to repair; but if the possessor of a house complain that his neighbour has obstructed his lights or injured his foundation, he must establish his right to the lights or foundation injured, and by so doing he proves the obligation of the neighbour not to infringe those rights. The instances of easements are put, because the least tangible of possessions, and most difficult of proof; but the same rule holds as to houses and lands: it is self-evident that the party possessed may complain of any act of another, which renders his occupation less valuable or less commodious. This flows from the nature of possessions, which are always presumed absolute; and he who seeks to show them subject to a qualification or condition, must prove the qualification or condition, but the possessor has no occasion to establish that he has a right to hold inviolate and unannoyed. The party complaining of a dilapidation must show an original inherent qualification of the presumed absolute right of the party possessed: the party complaining of a nuisance has to prove either

that the party complained of has exceeded his presumed absolute right, or has granted a portion of it to him, and has derogated from that grant.

The subject is thus divisible into two branches; the first being dilapidations, or rather waste (which term denotes the act of the party, and is therefore correlative to nuisance): it may be defined as the act or default of one party, having a right to use a tenement to the injury of another, having a right to the same tenement;—the second comprehending all nuisances which are the acts or defaults of the possessors of tenements to the injury of strangers, or of parties interested in the neighbouring tenements.

It is only where the right to use is limited in point of duration, and the right of the successor certain to take effect, that there can be any obligation to repair: thus tenant in fee simple and tenant in tail are under no obligation in this respect, because the tenant in fee simple has the entire absolute property in the land, and the right of a remainderman after an estate in tail is so remote and uncertain, that its value cannot be affected by any dilapidations or alterations of the tenements. It is not essential that the right of succession should be vested in any certain person, if there be a right of succession which is certain to take effect: thus, in the case of an ecclesiastical benefice, though the successor be not known until after the incumbent's estate is determined, he is under an obligation to repair, which the successor may enforce against him or his representatives.

The obligation to preserve from dilapidations, resulting from the right to use, varies with the nature and extent of that right; different tenants being bound to different repairs, according to the nature of their estates, and the covenants and conditions to which they agree. It also

Dilapidations
and Waste de-
fined.

Nuisances de-
fined.

Obligation to
repair; to what
Estates at-
tached.

Nature of Obli-
gation to re-
pair.

varies with the nature of the thing used, whether houses, lands, or trees ; such things being subject to different dilapidations, and requiring to be used in a different manner.

The obligation to repair being a charge upon the particular tenant, should in justice be proportioned to the benefit he derives from his tenure, in the same manner as on the bailment of a moveable chattel, the degree of care required from the bailee is ordinary or extraordinary, according as the contract of bailment is wholly beneficial to the bailee, or of mutual advantage to both parties. Thus, if the tenant receive the entire usufruct of the tenement, and render nothing to his grantor in the shape of rent or purchase money, it is but just that he should restore the tenement in exactly the same plight as he received it, supplying all defects, whether arising from accident or decay. If the benefit of the occupation be mutual, the tenant should receive all the usufruct he stipulates for, and should not be bound to supply defects which are the ordinary results of time and use ; because, as the bargain is for the right to use the tenement, and as the grantor receives an equivalent for that right, he is only entitled to a restoration of the tenement, as diminished in value by the user, and has no more right to have that wear supplied, than he has to possess the tenement during the term for which he has granted it. But as the intention is that the tenant should hold and occupy during the whole of his term, it may be inferred that he should keep the tenements in tenantable repair ; that is, supply all occasional and accidental defects, which expose the tenements to premature decay, and which are necessary to keep them in a state fit for occupation. Such is the general reason on which is founded the obligation not to suffer dilapidations, the suffering of which is called Permissive Waste ; and it is evident, that wherever such an

Distinction between Permissive and Voluntary Waste.

obligation exists, the party is also bound not to do any act which will cause dilapidations, or, in legal language, not to commit voluntary waste.

The rule against Voluntary Waste includes an alteration Alteration of Tenement. in the tenement, although it be not thereby rendered less valuable, or even though the effect of the alteration be to increase the value: the reason is, that the act of alteration exceeds the right to use, and infringes on the right of the grantor, which is to have the tenement in the same condition as when granted, as near as may be; and although the alteration may increase the merchantable value, it may not be an improvement, in the eyes of the grantor, or may impose upon him an additional charge to keep the tenement in good condition, or may be used by the tenant as evidence that he has a greater estate than that granted to him.

There may be cases in which the balance of benefit is so great on the part of the grantor, that the grantee ought to be exempt from responsibility, in respect even of voluntary waste, and be entitled to alter and use the tenements in the manner best suited to his own profit or convenience, without regard to the interest of the reversioner; but in no case can it be just that the owner of a particular interest in a tenement should have power maliciously or mischievously to injure it.

From the above remarks it will be seen that there are Division of Waste. three species of waste,—permissive, voluntary, and malicious. Permissive waste is of five sorts: first, the neglect to repair the necessary effects of time and use; second, the neglect to repair the consequences of inevitable accident; third, the neglect to repair the external or internal coverings of a building; fourth, the omission to protect the fabric of the building from the consequences of dilapidations in the coverings; and, fifth, the omission to

Of the Obligation to repair.

prevent the wrongful act of a stranger. The obligations of parties with respect to dilapidations may be ranged into three classes : first, those cases where no equivalent is rendered to the grantor for the advantage derived from the occupation ; second, where an equivalent is rendered, and benefits are balanced ; third, where more than an equivalent is rendered. This mode of proportioning the obligation to repair to the benefits derived by the grantee, under the contract to use, although abstractedly just, and perhaps the reason of the variations in the law of dilapidations, is nevertheless too vague to be carried out into practice. It is not therefore necessary to inquire, in each particular case, whether the occupation is more or less beneficial to the tenant or profitable to the reversioner, but the law applies the different obligations to repair to general classes of occupations, according to the general nature of the class.

Obligation of Ecclesiastics ;

Of the first class, are the obligation to repair, of the incumbent, of an ecclesiastical benefice,—the obligation of the public to repair churches, highways, bridges, and sewers. The incumbent of a benefice receives the whole profits of the tenements of which the benefice is endowed, without rendering any equivalent to his patron : by the endowment the patron has transferred the whole beneficial use of the tenements to the incumbents in perpetual succession. Although the incumbent performs services to the public, his services are not given for the occupation of the temporalities of the benefice, but he is endowed with the temporalities in consideration of his services, and the public have no interest or right to use nor do they derive any benefit from the temporalities : the only persons who have right to use are the successive incumbents, during the periods of their respective incumbencies ; and as the obligation to repair of one incumbent cannot be greater

than that of another, it is evident, that if they were not bound to supply even the necessary effects of time and use, and the consequences of inevitable accidents, the buildings attached to the benefice might soon fall into irretrievable decay, and, in case of destruction by accidental fire, would never be rebuilt.

The public have the sole right to use churches, highways, bridges, and sewers, and they are all interested in having them kept in perfect repair. They must, at all events, keep them in such a state of repair as is necessary for the purposes for which they are required.

Of Public
to repair
Churches,
Highways, &c.

In these cases there can be but little question as to the nature and extent of the obligation, since it is obvious, that whenever the church, highway, or sewer is so far dilapidated as to cause danger or inconvenience, the parties bound must put it in perfect repair with reference to the purpose for which it is required; unless indeed an individual is liable by prescription, which is an exception to the general rule, in which case the prescription may ascertain the extent of his liability; and if the necessities of the public require a greater degree of repair, they may be bound to do it. The chief subject of inquiry in such cases is as to the parties bound, whether the public generally, or a particular portion of the public, or an individual. The law, generally speaking, imposes the obligation on that portion of the public who derive the most benefit from the right in question; but an individual may be liable to repair a church, highway, bridge, or sewer, to the exoneration of the public, for some good apparent reason, as the tenure of certain lands. It will be here observed, that the obligation to repair does not result from the estate and property in the land, so much as from the right to use, which is the consequence of the estate and property; and thus the public are bound to repair churches, though

they have no property in them, but only an easement, or privilege of using them for a particular purpose, such privilege excluding any other beneficial use of the buildings.

Churches and highways are repairable by the inhabitants of the parish in which they are situate. The obligation is an obligation of the parishioners towards the public generally, who all have an interest in the support of churches and maintenance of highways; and there is also an obligation of each individual parishioner towards the general body, to contribute his proportion of the expense. The general utility of highways, and the justice of the law that every individual should bear a proportion of the charge of the reparation thereof, will be readily conceded; but it is not so generally admitted, that the repairs of a church should be a general charge upon the public. It cannot be denied that the diffusion of religious principles is a benefit to all men; and if so, it is not unjust that the law should provide edifices for the diffusion of those principles, and impose on the parishioners generally the obligation to repair them, and to bear the charges incident to the decent solemnization of divine service. It is also necessary and beneficial to the public, that all the dead should be buried: the law has, therefore, assigned a place in every parish for the purpose, and required the parishioners to keep it in repair.

Bridges. Bridges being maintained at a greater expense than ordinary highways, and not being situate in every parish, it tends more to the equality of the burden that the charge of repairing them should be borne by a larger district: for this reason, the law has imposed the obligation of repairing bridges upon the inhabitants of the county.

Sewers. Sewers, which include sea walls, and every other erec-

tion or device for the protection of lands from the inundations of the sea or rivers, or for draining off land-waters, are not, like churches, highways, and bridges, beneficial to the public generally, but only the proprietors of particular levels, liable to be damaged by inundations, or requiring drainage. The inhabitants and proprietors of a level alone are bound to repair the walls and banks by which they are protected from floods, and the sewers by which they are drained; and this is, in its nature, an obligation of one proprietor towards the other proprietors, who are subject to a common danger or inconvenience, and rather private than public, though common to many individuals. It is an obligation which the Queen is considered as interested in enforcing. It is her prerogative to take precautions against the encroachments of the sea, by which her territory is diminished; and, as she is *ultimus hæres* of all the lands in the realm, she may be said to be a loser when any of them are swallowed up by floods.

Although the obligation to repair churches, highways, bridges, and sewers, are equally well ascertained, there is an observable difference as to the manner in which they are sanctioned. It is the duty of churchwardens to see that the church is repaired; but it is left to the parishioners themselves to determine what repairs shall be done, and the amount that shall be expended: if they deny their obligation, the votes of the majority denying the obligation to repair are considered as thrown away, and the votes of the minority, who admit the obligation, prevail; and if they suffer the church to become dilapidated, they may be proceeded against by ecclesiastical censures. At common law, the repairs to be done to highways and bridges, and the amount to be expended, were equally under the control of the inhabitants of the parish or

county; though, if they neglected to do sufficient repairs, they were and still are liable to an indictment. By statute, the repairs of highways are subject to the control of a surveyor, and those of bridges to the justices of the peace. The maintenance of sewers and sea walls was never voluntary, but was under the direction of commissioners of the Crown.

**Ecclesiastical
Dilapidations.**

There is another peculiarity with respect to dilapidations by ecclesiastics, and dilapidations of churches. Churches and the endowments of benefices are the property of clergymen as members of the Church, which is in the nature of a vast corporation having laws of its own, and courts of its own, subsidiary indeed to the common law, and subject to the supervision of the Common Law Courts. These dilapidations are therefore in part regulated by the ecclesiastical law, and the obligation to guard against them enforced by the Ecclesiastical Court. This law and these courts only concern themselves with the corporate interests of the Church; the common law therefore sanctions the obligation of ecclesiastics so far as the interests of individuals are concerned, and provides remedies for patrons and successors; and where the obligation to repair is founded upon a statute or a custom, upon which matters an Ecclesiastical Court is incompetent to decide, it is enforced by the Common Law Court.

**Obligation of
Tenants for
Life and Years.**

The second class includes the obligation on all particular tenants, whose estate is less than an estate of inheritance, except ecclesiastical incumbents. The law relating to the general obligation of these tenants to repair is called the Law of Waste; the law relating to the obligation of ecclesiastics is called the Law of Dilapidations.

At common law, only those tenants whose estates were created by law were liable for permissive waste in the absence of express stipulation. If the estate was created

by the party, and there was no condition against waste, or covenant to repair, it was considered that it was not intended to place the tenant under any obligation to repair, and the case was presumed to be of the third class. The statute of Marlbridge has altered this presumption, and now tenants for life and for years, whether their estates are created by act of law or act of the party, are equally liable for waste, as well permissive as voluntary, unless it is expressly provided that they shall be without impeachment of waste.

In these cases, it being presumed that an equivalent for the occupation is given to the grantor, the tenants are not bound to repair the necessary and inevitable effects of time and use. Their obligation is to preserve the tenements from premature decay by reason of exposure to the weather, and for this purpose to repair the external and internal coverings of the fabric of the buildings. They are liable for permissive waste of the fourth sort.

Mortgagees, who, although they have at law an absolute Mortgagees. estate in the tenements mortgaged, are in equity deemed to hold them as a pledge merely, are in equity under a similar obligation to the mortgagors. Of course they are entitled to be allowed the sums expended in necessary repairs out of the profits of the premises.

The obligation of a tenant for life or years may be ex- Obligation by
Covenant. tended by express covenant. Such covenant is construed with reference to the common law obligation, and unless an intention to the contrary is manifest, does not render the tenant liable to repair the necessary effect of time and use, or the inevitable decay of the fabric of the building. In ordinary cases the obligation is against permissive waste of the third sort. They are also liable to repair dilapidations caused by inevitable accident.

All tenants who are liable for permissive waste are re- Waste by
Strangers.

sponsible for waste committed by strangers, which it is presumed they are able to withstand, and against whom they have a remedy. If the strangers are the Queen's enemies, or felons, their acts of waste are in the nature of inevitable accidents, for which tenants for life and years, not under covenant to repair, are not liable.

Tenants without Impeachment of Waste, and Tenants at Will.

In the third class may be ranged—tenants without impeachment of waste, and tenants at will. Neither of these are liable for permissive waste,—the tenant without impeachment by reason of the expressed intention of the grantor of the estate; and the tenant at will by reason of the infirmity of his estate. An estate at will is, in contemplation of law, of no value; and therefore whatever services such tenant renders to his landlord, and it may be presumed that he renders some, must be more than an equivalent for his estate.

Malicious Waste.

All tenants, except tenants without impeachment of waste, are liable for voluntary waste; and tenants without impeachment of waste are liable in equity, but not at law, for malicious waste. Malicious waste consists in pulling down the mansion-house or felling timber planted for the ornament or protection of the mansion-house. The Court of Chancery considers that it was not the intention of the grantor to confer the power of destroying such things. From this waste being solely cognizable in Courts of Equity, it is called Equitable Waste.

Tenants in Common.

Questions respecting dilapidations occasionally arise between persons interested jointly or in common in tenements. In such cases there is no obligation by one to the other to repair any particular dilapidations. One tenant has a remedy against his co-tenant if he commit voluntary waste, and may compel him to contribute towards the necessary repairs of houses and mills.

The general obligation of neighbours as to party walls

and fences dividing their premises is the same as that of tenants in common, if they are tenants in common of the wall or fence. One may be, by prescription or contract, bound to repair a fence so as to prevent cattle in his land from straying into his neighbour's.

The subjects of dilapidations are houses and other artificial erections and ways, gardens, land, and trees. Things made by art demand the exercise of art to preserve them from decay. It is only as to such things that the law of permissive waste is applicable. With respect to gardens, lands, and trees, tenants are by the general law merely prohibited from committing voluntary waste. But where lands are let for the purpose of cultivation, as they are almost universally to tenants for years, they are bound to cultivate them in a husbandlike manner, and according to the custom of the country; that is, in the manner in which farm-lands are usually cultivated in the part of the country in which the lands leased are situate.

It is voluntary waste in gardens to cut down the fruit trees, or destroy or remove the shrubs and plants growing there, except for the purpose of cultivation.

It is voluntary waste in land to alter its nature so as to diminish its value or affect the evidence of title: an alteration in the course of good husbandry, which does not either diminish the value of the land or impair the evidence of title, is not waste. It is also waste to take the substance of the land, as clay or minerals, except where open mines or quarries are leased, in which case there is an implied authority to continue working them.

Waste as to trees consists in felling timber trees, that is, trees which contain, or when mature will contain, wood useful for building purposes. The property in such trees belongs to the owner of the inheritance, and in the case of ecclesiastical property to the Church. No particular

tenant can do any act to destroy or injure their growth, or fell them, except for the benefit of the inheritance, as to repair buildings and fences standing on the land demised. It is not waste to cut down trees not timber, in such a manner that they will grow again, unless they have been planted for some particular purpose implying permanence, such as for the ornament or shelter of a house, or for the support of a bank or hedge, or in a field for the shade of cattle. But it is waste to grub up or destroy any trees, whether timber or not.

Fixtures.

There is an important exception to the law against voluntary waste in the instance of fixtures. By this exception a particular tenant, who has made erections or fixed machinery to premises for the purposes of a manufacture or trade, or has added to a house any particular article of ornament or domestic convenience, which may be removed without injuring the house, is entitled to remove the things so fixed. From the occasion and purpose of the annexation, an authority from the owner of the inheritance to fix and remove is inferred, and an intention of the particular tenant to abandon his property in the fixture, which would in ordinary cases be presumed, is negatived.

**Nuisances to
Neighbour's
Land ;**

A nuisance is an act or neglect of a man on his own land, the consequences of which extend beyond his possessions, and encroach upon the possessions or rights of his neighbour. The general law as to the limits of possessions is, that he to whom the soil belongs has a right to all the space perpendicularly above and below ; and therefore, so long as the effects of an act or neglect are confined within those limits, there is, generally speaking, no nuisance. But if, in using our land, we encroach upon or disturb our neighbour in the enjoyment of any part of the space above or below his land, such act is a nuisance ; as if we build

so as to overhang our neighbour's land, and cause the water from the eaves of our building to fall upon his land, or if we carry on a noisome and offensive trade, so as to corrupt the air over the adjoining land with noxious effluvia, or disturb it with deafening noises, or dig under the foundation of a house standing thereon.

It would manifestly interfere with the conveniences of society, if every noise, or every smell, which the delicate perceptions of a neighbour considered disagreeable, amounted to a nuisance: the law, therefore, modifies itself to the exigencies of mankind, and determines that the noise or stench must be so considerable in degree, and so long continued, as to destroy the comfort of a person of ordinary sensibility in the occupation of his property.

Our neighbour may by grant, or by long enjoyment, To Easement. which causes a grant to be presumed, acquire an easement over our land, for the more convenient or profitable occupation of his own, by which his rights spread themselves into our possessions, and become, as it were, interfused with ours, and operate to control us in the use of our land: in such case it is a nuisance to obstruct his enjoyment of such easement, though we do not encroach upon his territory: thus, if we give him permission to build upon the verge of his land, and to open windows looking over our land, he acquires right to our land for the support of his house, and to the air over our land for light to his house, which rights are called easements; and we cannot dig into our land so as to weaken the foundation of his house, or build so as to darken his windows, though, if he had acquired no right to those easements, either by grant or prescription, we might.

If the tenement be used so as to prejudice the whole Public Nuisance. neighbourhood, or to injure a public right of way, it is a public nuisance; and the parties causing it are punishable

by indictment, at the suit of the Queen, and not by action at the suit of an individual, unless he has sustained some particular injury over and above that inconvenience which he has suffered in common with the rest of the public.

CHAPTER I.

DILAPIDATIONS BY INCUMBENT OF AN ECCLESIASTICAL BENEFICE.

1. Nature of the Obligation.—2. What Persons bound; Archbishops, &c.—3. Vicar.—4. London Parson.—5. Perpetual Curate.—6. Augmented Curate.—7. Sequestrator.—8. Subjects of Dilapidations; Tenements not Parcel of Benefice.—9. In the Case of a Prebend.—10. Lands recently annexed.—11. Repairs of Church and Chancel.—12. Of Houses and Buildings.—13. Dilapidations in time of Predecessor.—14. Dilapidations during Vacancy.—15. Obligation to rebuild.—16. Right to alter.—17. Unsuitable Residence.—18. Fixtures.—19. Materials.—20. Borrowing Money for Repairs.—21. Obligation as to Timber.—22. Trees in Churchyard.—23. Obligation as to Fences.—24. Obligation as to Husbandry.—25. Right to Mines, &c.—26. Right to Emblements.—27. Precautions against Dilapidations; Restraint upon Power of Leasing.—28. Visitation.—29. Prohibition and Injunction.—30. Remedies; Suit in Ecclesiastical Court.—31. Action at Law.—32. Statutory Penalties for Dilapidations.

1. THE dilapidations of ecclesiastical buildings are regulated and sanctioned by two laws,—the common law and the ecclesiastical law. By the ecclesiastical law, the incumbent is compelled to repair dilapidations as a member of the Church, lest the possessions of the Church should diminish in value. By the common law, the rights of the successor and patron are enforced, and remedies are provided to protect them from loss. Ecclesiastics are entitled to possess houses for residence, and other tenements,

The Obligation
of Incumbent
of Benefice as
to Dilapidations.

during their incumbencies of their benefices, as a reward for their services in the celebration of divine worship and the diffusion of religious knowledge. The tenements pass from incumbent to incumbent in perpetual succession; no other fund is provided for repair or restoration of dilapidation and decay, save the revenues of the benefice. They are necessarily bound to repair every description of dilapidation in the most substantial manner.

Persons bound
to repair.

2. Every ecclesiastic who has a corporate character, and is endowed of tenements liable to dilapidations, is responsible for dilapidations. The obligation to repair is a condition annexed to the tenure of his estate. Archbishops, bishops, and deans have a fee-simple, in right of the Church, to them and their successors. Before the disabling statutes, they had the power absolutely to dispose of the property of their churches: an archbishop or bishop, with the consent of his dean and chapter;^a a dean with the consent of his bishop and chapter, or perhaps with the consent of his chapter alone.^b This power of alienation was given them not for their own benefit, but on the assumption that it would only be exercised where it was for the benefit of the Church, and therefore is not inconsistent with their estates being qualified with an obligation to keep the buildings in repair. Prebendaries, parsons, and vicars have only a life estate

^a Co. Lit. 341 b. Dean and Chapter of Norwich's case, 3 Rep. 75 a.

^b Chaffyn de Mere's case, Dyer, 40 b. Walroad v. Pollard, Dyer, 273 a. Watson's Clergyman's Law, c. 44, p. 477, 4th edition.

in their benefices, and at common law could only dispose of their ecclesiastical property with the assent of their patrons and ordinaries.* This difference between the estates of dignitaries and other clergymen may be a reason why a parson is at law liable to his successor for dilapidations, and a bishop is not.

The Constitution of Archbishop Edmund^b (1236)^{Archbishops, &c.} mentions rectors and vicars, who have all the revenues of the church paying a moderate pension, as liable for dilapidations. By the Constitution of Cardinal Othobon^c (1268), all clerks are to take care to repair the houses of their benefices and other buildings as need shall require; and archbishops, bishops, and other inferior prelates, are enjoined by the attestation of the divine judgment that they keep in repair their houses and other edifices. The statute 13 Eliz. c. 10, is a legislative declaration that archbishops, bishops, deans, archdeacons, provosts, treasurers, chancellors, prebendaries, and others having dignity or office in cathedral and collegiate churches, and parsons, vicars, and other incumbents of ecclesiastical livings whereunto belong houses or other buildings, are parties liable for dilapidations.

3. On the institution of vicarages, the vicar^{Vicar.} was only tenant at will to the rector. The freehold of all the lands, houses, &c., attached to the benefice was vested in the rector, and he, of course, was bound to do the repairs.^d But the statute 14

* Lit. s. 643-645. Hodgeskins v. Tucker, Dyer, 239 a.

^b Edm. Lynd. 250.

^c Othob. Anth. 112.

^d Degge Par. Coun. part 1, c. 13.

Edw. III. c. 17,^a which enacts that a vicar may have a writ of *juris utrum* (a writ applicable to a person claiming a freehold in lands, in right of an ecclesiastical benefice), and the statute 4 Hen. IV. c. 12, which provides that in every church appropriated a secular person shall be ordained vicar perpetual, and be canonically instituted and inducted in the same, have been considered to confer on him a freehold estate in the tenements of which he is endowed.^b Since these statutes, therefore, a vicar has been liable for the dilapidations of the buildings and lands with which the vicarage is endowed, in the same degree as a spiritual rector is, in respect of the buildings parcel of his rectory.

London
Parson.

4. Mr. Elmes, in his work on Dilapidations, mentions two instances, as having occurred in the course of his practice, in which the liability to dilapidations was disputed, on the ground that the parsonage houses had been burned at the great fire of London; and that by the Act for rebuilding the city, 22 Car. II. c. 11, s. 72, reciting that several parish churches, chancels, parsonage and vicarage houses, were consumed in the late dismal fire, to the end, therefore, that parsons, incumbents, and vicars might not be liable to the rebuilding of their chancels, parsonage and vicarage houses, nor *be sued for dilapidations*, it was enacted, that the incumbents, parsons, and vicars of the aforesaid churches, their executors and administrators, should

^a C. 17, in *Rastall v. Ruffhead*; C. 16, in *Rol. Abr.*

^b 2 *Rol. Abr.* 336. *Vin. Abr. Presentation F. God. Rep.* 197; c. 18, s. 2. *Wood's Inst.* 40. *Watson's Clergyman's Law*, 400. *Vide Runcorn v. Doe dem. Cooper*, 5 B. and C. 696.

be, and were, indemnified as to the rebuilding of their respective chancels, parsonage and vicarage houses, *and should not be liable for any suits, troubles, or molestations which might arise for the dilapidations aforesaid*, and that no process should be issued out of any Court whatsoever against the persons aforesaid for their not rebuilding their respective chancels, and parsonage and vicarage houses, any law or statute to the contrary in any-wise notwithstanding. Nothing can be clearer, than that this statute merely exonerated incumbents from liability for dilapidations caused by the calamity which gave occasion to the enactment: and to construe the statute, as if it rendered the incumbents irresponsible for future dilapidations, is so unreasonable, that it deserves not confutation. These cases are mentioned because the error may still exist, and the weak foundation on which it rests not be known.

5. It has been held that at common law a curate ^{Perpetual Curate.} is removable at pleasure, though by the canon law he cannot be removed without cause;^a that he is therefore incapable of endowment, and cannot be entitled to tithes,^b nor can he prescribe for a salary;^c and if he can hold no property in right of his curacy, he cannot be liable for dilapidations.

In *Pawly v. Wiseman*,^d a suit in the Arches was

^a Lynd. 310.

^b *Bott v. Brabalon*, Noy, 15. *Price v. Pratt*, Bunb. 273.

¹ Barn. K. B. 233.

^c *Birch v. Wood*, 2 Salk. 506.

^d 3 Keb. 562, 579, 614, cited in Burn's Ecc. Law, tit. Dilapidations, vol. ii. p. 153 b, as the Curate of Orpington's case.

brought against the executor of the curate of Knockton or Orpington by his successor, who had been appointed by deed by Dr. Say, parson or vicar of the parish. He was appointed to receive tithes, and had a stipend. Whether he was curate of the whole parish, and occupied the rectory or vicarage house, or whether his curacy was a subdivision of the parish with a distinct residence, does not appear. A prohibition was moved for on 13 Eliz. c. 10. By the Court: "A curate being but at will, is not liable for dilapidations, being not instituted nor inducted; and this appearing on the libel, this Court ought to prohibit on 13 Eliz. c. 10: an appointment by licence of archbishop being but as lessee at will, is no incumbent. Notwithstanding Twisden held that there ought to be no prohibition before the Spiritual Court's judgment that the curate is liable, yet a prohibition was awarded."

Dr. Burn^a disapproves of this case, and refers to the commentary of Anthon on the Constitution of Othobon, that all clerks shall take care decently to repair the houses of their benefices and other buildings as need shall require, which, according to the commentator, includes curates.^b Serjeant Hill holds it good law.^c Sir George Hay held that a perpetual curacy is not an ecclesiastical benefice.^d

^a Ecc. Law, tit. Dilapidations, vol. ii. pp. 153, 154.

^b Oth. Anthon. 112.

^c Note to 2 Burn's Ecc. Law, 154.

^d Weldon v. Green, 1772. 2 Burn's Ecc. Law, 55, tit. Curate. As to the origin and nature of perpetual curacies, vide Duke of Portland v. Bingham, 1 Hag. Con. Rep. 157; Hine v. Reynolds, 2 Man and Gran. 71; Burn's Ecc. Law, tit. Appropriation.

In the recent case of *Oliver v. Latham*,^a where perpetual curates in succession had held and received under a claim of right, a residence house, glebe lands and tithes, for upwards of 200 years, an endowment was presumed from the mere duration of possession, though the origin could not be accounted for; the rectory having been in strict settlement from a time prior to 17 Charles II. until subsequent to the Mortmain Act.

6. When a curacy is augmented by the Governors Augmented Curate. of Queen Anne's Bounty, it becomes from the time of such augmentation a perpetual cure and benefice, and the minister duly nominated and licensed, and his successors, is a body politic and corporate, and has perpetual succession, and is enabled to take lands.^b

So by the Church Building Acts^c and other sta- Under Church Building Acts. tutes, many new benefices have been created which are perpetual curacies, and the incumbents perpetual curates and corporations, and capable of holding endowments in right of their curacies.^d

^a 1 Young and Col. N. S. 248. 1 Phillips, 408.

^b 1 Geo. I. stat. 2, c. 10, s. 4.

^c The first of these Acts is 58 Geo. III. c. 45; and the last, 8 & 9 Vict. c. 70.

^d New benefices are provided for by the Church Building Acts in the following cases: 1st. Where a parish is completely divided, each division is of the same nature as the original parish, i.e. rectory, vicarage, or perpetual curacy (58 Geo. III. c. 45, s. 16, 19). 2nd. Where a parish is divided into district parishes for ecclesiastical purposes, each district parish is a perpetual curacy (58 Geo. III. c. 45, s. 21, 25). 3rd. Where different parts are taken from different parishes and formed into a consolidated chapelry, it is a perpetual curacy (59 Geo. III. c. 134, s. 6; 8 & 9 Vict. c. 70, s. 9). 4th. Where a district is assigned

By section 13 of 8 & 9 Vict. c. 70, the freehold of every church and burial ground (when consecrated), and of the house, garden and lands for the residence and glebe of the incumbent, conveyed to the Commissioners for Building Churches, is vested in the incumbent or minister of the church for the time being.

In these cases, the perpetual curates have a freehold in right of their benefices in the houses and lands of which they are endowed, and are consequently liable for the dilapidations of such tenements.

Curates of
Non-resident.

By 1 & 2 Vict. c. 106, the bishop has power in certain cases of non-residence, or where the duty is inadequately performed, to appoint curates, and assign them stipends. Where a stipend is assigned to the curate equal to the whole annual value of the benefice, it is to be subject to deduction in respect

to a chapel, it is a district chapelry and perpetual curacy (59 Geo. III. c. 134, s. 16; 2 & 3 Vict. c. 49, s. 1 and 2; 8 and 9 Vict. c. 70, s. 17); and may be converted into a distinct parish, or district parish (3 Geo. IV. c. 72, s. 16). 5th. Where a church is built and endowed by a private person, and a district is assigned thereto, it is a perpetual curacy (5 Geo. IV. c. 103; 7 & 8 Geo. IV. c. 72; 1 & 2 Wm. IV. c. 38, s. 12; 1 & 2 Vict. c. 107, s. 10; 2 & 3 Vict. c. 49, s. 3). Other cases are, 1st, Where a parish is constituted by an Order in Council upon the scheme of an archbishop or bishop (1 & 2 Vict. c. 106, s. 26; 2 & 3 Vict. c. 49, s. 8). 2nd. Where a district for spiritual purposes is constituted upon a scheme of the Ecclesiastical Commissioners (6 & 7 Vict. c. 37, s. 9, 12, 16; 7 & 8 Vict. c. 94). 3rd. Where a church is augmented upon a scheme of the Ecclesiastical Commissioners (8 & 9 Vict. c. 70, s. 13). In these three last cases the new benefices are perpetual curacies.

of charges and outgoings;* and the bishop may, on the application of the spiritual person holding the benefice, allow him to retain in each year so much money, not exceeding one-quarter of the annual value, as shall have been actually expended during the year in the repair of the chancel and house of residence and premises and appurtenances thereunto belonging, in respect of which he or his executors would be liable for dilapidations to the successor. And where the annual value of the benefice does not exceed £150, the bishop may allow the spiritual person holding the benefice to deduct from the curate's stipend so much money as shall have been actually expended in such repairs above the amount of the surplus remaining after payment of such stipend, the sum to be deducted not exceeding one-fourth of the stipend.^b

7. A sequestrator, who is merely the bailiff of the Sequestrator. bishop,^c is bound, out of the revenues of the benefice, to keep the buildings, &c., and chancel, in repair; and if he neglect his duty in this respect, he may be sued in the Bishop's Court.^d The charge for dilapidations is a direct charge on the revenues of the benefice, and prior to that of the creditor of the incumbent.

8. The temporalities of an ecclesiastical benefice, Subjects of Dilapidations. which are subject to dilapidations, are the church, churchyard, houses, buildings, trees, and glebe lands.

It is only those tenements which are parcel of Tenements not Parcel of Benefice.

* 1 & 2 Vict. c. 106, s. 91.

^b Sec. 92.

^c *Harding v. Hall*, 10 M. and W. 42.

^d *Hubbard v. Beckford*, 1 Haggard, 307. *Whinfield v. Watkins*, 2 Phil. 1.

the benefice, and of which the incumbent has a freehold estate in his corporate character, that he is liable to repair.

Possession by different incumbents in succession affords evidence of lands being parcel of the benefice.^a Where lands have been held by the incumbents from time immemorial, and the original endowment cannot be shown, or though they are not mentioned in the original endowment, it is presumed, where it can be done with any probability, that they have been legally annexed to the benefice. In the case of Coyne, vicar of Aldbrooke,^b the question was about a piece of land, parcel of the glebe. The endowment of the church in the time of Henry III. was offered in evidence, in which no land was mentioned. The answer to this was, that ever in those endowments liberty was reserved to increase the maintenance of the church. It was urged further, that no land was in the valuation of this church in the time of Henry VIII., when the churches were valued; but answer was made, that lands were not in those valuations, and there were omissions of many particulars, and the vicarage house in this case was omitted, and yet never questioned but this did belong to the vicarage. But where it appeared that the rector of a benefice had

^a Griffin v. Stanhope, Cro. Jac. 456, per curiam.

^b Coyne's case, Clayton, 9. Vide also Brigham v. Robson, 2 Keb. 729; Twisse v. Brazenose College, Hard. 329; Barsdale v. Smith, Cro. El. 643; Cope v. Bedford, Palm. 426; Lord St. John v. Dean of Gloucester, 12 Rep. 3; Crimes v. Smith, 12 Rep. 4; Bedle v. Beard, 12 Rep. 4; Oliver v. Latham, 1 Y. and C. N. S. 248; 1 Phillips, 408; Regina v. Chapter of Exeter, 12 A. and E. 512, as to presumptions from possession and usage.

first become possessed of land since the statute of Mortmain (9 Geo. II. c. 36), which provides, that land granted to charitable uses shall be conveyed by deed enrolled, (he had taken possession under a will, dated in 1754, whereby it was devised to himself and two others,) the Court held that they could not presume that it had been legally annexed to the benefice, though five rectors in succession had held it for a period of fifty years; and therefore, that the defendant, an incumbent who had vacated the benefice, was not liable to his successor for dilapidations in respect of that land.^a The statute excluded the presumption of a conveyance by deed enrolled from the mere circumstance of possession. Though if any evidence could have been given of rolls under the Mortmain Act having been lost or destroyed, a conveyance by deed enrolled might, it seems, have been presumed.^b In another case, where the legal estate in some copyhold cottages, &c., was in trustees, to whom they had been devised to pay over the clear rents and profits to the vicar of Chesterton for the time being, after deducting the duties to the lord and the expenses of repairs, it was decided that the vicar could not sue his predecessor for the dilapidations of the cottages.^c

Lyndwood,^d in his commentary on the Constitution of Archbishop Edmund, which provides that the amount necessary to repair houses shall be deducted out of the goods of a deceased rector, says

Lands held by
Tenants.

^a Wright v. Smythies, 10 East, 409.

^b Doe d. Howson v. Waterton, 3 B. and Ald. 152, pr. Bayley, J.

^c Brown v. Ramsden, 8 Taunt. 559. 2 Moore, 612.

^d Lynd. 250. Oth. Anth. 112.

that the Constitution extends to the rectory or vicarage house, and every other building, the repairing of which belongs to the rector *immediately*; but not to those houses the building or repairing whereof pertaineth immediately to others, according to ancient feudal gift, such as tenants and vassals, who by their tenure are bound to do repairs. From this it may perhaps be inferred that ecclesiastics are not bound to their successors or to the Church to repair buildings which have been leased so as to bind their successors. By such leases, the lessees are necessarily bound to repair.

Vicarage converted into Rectory.

By 3 Geo. IV. c. 72, s. 13, by which the Commissioners for Building Churches are empowered in certain cases to convert vicarages into rectories by re-uniting the tithes and glebe of the impropriate rectory to the vicarage, it is provided, that no incumbent shall in any such case become liable to the upholding or repair of more than one house of residence in any such parish or place; and when in any such parish or place there shall be more than one house belonging to the church or chapel thereof, the bishop of the diocese shall decide, order, and declare which shall thereafter be deemed the house of residence, and be upheld, and maintained, and repaired as such, and the order of the bishop shall be registered in the registry of the diocese, and a duplicate copy of such order be deposited and kept in the chest of the church or chapel of such parish or place.

Barns useless by Tithe Commutation.

By the Tithe Commutation Act,* any barns or

* 6 & 7 Wm. IV. c. 71, s. 87.

buildings, generally used for the housing of tithes in kind, which have been rendered wholly or in part useless by the commutation, may, with the consent of the Tithe Commissioners, and subject to such directions as they may give under their hands and seal, be pulled down entirely or partly, and the materials sold; or the barns and buildings, and the site thereof, either with or without any farm buildings and homesteads thereunto belonging, may be sold in such manner as the Commissioners direct.

9. In Doctor Sands' case,* it appeared that in the cathedral church of Wells there were eight prebends and eight houses. The houses were not specifically annexed to each prebendal stall, but generally to the cathedral, and the bishop assigned to each prebendary such of the houses as he thought fit. One of these houses was assigned to Dr. Pierce, who suffered it to be dilapidated; and on his death, Dr. Sands, his successor, to whom the house was also assigned, commenced a suit against his executors, in the Spiritual Court, for the dilapidations. A prohibition was moved for, and it was contended, that the house not being parcel of the particular prebend, Dr. Pierce was not bound to repair; but to this it was answered by the Court, that when the house was assigned by the bishop to a prebendary, it became parcel of his prebend, and as such, the prebendary was bound to repair, and liable to a suit for dilapidations.

In the Case of
a Prebend.

10. In *Bird v. Relph*,^b an action against the

Lands recently
annexed.

* Skin. 121.

^b 2 Ad. and El. 773. 4 Nev. and Man, 878. Hil. 1835.

executors of a vicar for dilapidations of fences, it was contended, that as the land fenced was allotted to the vicar, under an enclosure act in lieu of tithes, and was not the ancient endowment of the vicarage, the common law liability of the vicar to dilapidations did not extend to the fences. But to this the Court answered, that when allotted, it became parcel of the vicarage, and was in the same predicament as if the vicarage had been originally endowed therewith; and as it was fenced when allotted, the vicar was bound to keep up the fencing.

Where the town of Blandford had been destroyed by fire, and Commissioners, under the provisions of a private Act of Parliament for rebuilding the town, had taken away the land upon which the vicarage house anciently stood, and assigned to the vicar other land; it was held, that he was bound to rebuild on such land.^a

Repairs of
Church and
Chancel.

11. "By the canon law, the parson ought to repair the whole church, but by the custom of England, the parson shall repair the chancel, and the parishioners the nave of the church; and by the custom of London, the parishioners shall repair the chancel also."^b

In the case^c in which Lord Holt is reported to have thus said, a prohibition was issued to the Spiritual Court because the plaintiff was sued there for a rate made upon the parishioners, as well for the repairs of the chancel as the body of the church, he

^a Sollers v. Lawrence, Willes, 413.

^b Holt, C. J., Pense v. Prowse. 1 Ld. Ray, 59.

^c Carthew, 360, nom. Hawkins v. Rouse, 5 Mod. 389. Holt, 139, nom. Hawkins's case, Comb. 344.

not being bound by custom to repair the chancel. By the common custom of England, the repairs of the nave of the church in which the lay parishioners sit, falls upon the parishioners themselves, but the repair of the chancel falls upon the rector.^a

The repairs of chancel are a charge upon the revenues of the benefice, and therefore where the rectory has been impropriated, the lay rector is bound to repair.^b By a Constitution of Archbishop Winchelsea, it is ordained, that the chancel shall be repaired by rectors and vicars, or others, to whom such repair belongeth. Upon which Lyndwood observes, that where there are both rector and vicar, they shall contribute in proportion to their benefice. By custom, the lay rector or the vicar may be bound to do all the repairs.^c By custom, too, the parishioners may be bound to repair the chancel, as well as the body of the church, as in London.^d In the Bishop of Ely v. Gibbons,^e it was found, upon an issue in prohibition, that the bishop, who was the impropriate rector, had never repaired the chancel, but that the parishioners had from time immemorial; and Sir John Nichol held that the custom was established and valid.

^a Anth. Othob. 112, cited by Tindal, C. J., *Veley v. Burder*, 12 A. and E. 301. See also 2 Inst. 489.

^b *Serjeant Davies' case*, 2 Rol. Rep. 211. *Walwyn v. Awberry*, 2 Mod. 254. S. C. Anon. 1 Mod. 258. S. C. Anon. 2 Vent. 35. S. C. Anon. 3 Keb. 829.

^c Lynd. 253. *Prideaux on Churchwardens*, 50. Ken. Par. Ant. 443.

^d *Pense v. Prowse*, 1 Ld. Ray, 59. *Ball v. Cross*, 1 Salk. 165. Holt, 138.

^e 4 Hag. 156. *Leger v. Dean & Chap. of Chichester*, 3 Phil. 90.

If either the rector or vicar repair the chancel, they are discharged from contributing to the repairs of the church, steeple, chapel, ornaments, or churchyard, in respect of the tithes and glebe; the reparation of the chancel being the proportion of the common burden which is imposed upon the property of the benefice.^a They are liable to be rated to the repairs of the church in respect of any other property they may have in the parish.^b

Where the benefice has not been appropriated, the freehold of the church and churchyard is in the rector; and where it has, it is doubtful from the authorities whether the freehold is in the lay rector or the vicar, or whether the lay rector has not a freehold in the chancel. When it is considered that the vicar is inducted into the church, by which ceremony corporal possession of the church itself is given to him, that the chancel is part of the church, and that the statute 4 Hen. IV. c. 16, requires that he shall be inducted into the church, the fair conclusion is, that he has the freehold, as well in the church and churchyard as the chancel. The meaning of the ceremony of induction is, to put the party inducted into possession of the freehold of the ecclesiastical tenements into which he is inducted.^c It is similar to livery of seizin, by which possession of a freehold estate is given to a lay tenant. Dr. Wood^d

^a Degge, part 1, c. 12. Prideaux, 50.

^b Serjeant Davies' case, 2 Rol. Rep. 211. *Slowman v. Churchwardens of Longrevil*, 2 Keb. 730, 742.

^c *Hine v. Bickley*, Plowd. 528. 2 Black. Com. 388, 391. *Burn's Eccles. Law, Benefice. vi.*

^d Inst. 40, 4th edit. 1728.

says generally, that the freehold of the church, churchyard, and glebe, is in the vicar. In the Clergyman's Law^a it is said, "I conceive that although the freehold and soil of the chancel may be in the appropriator or impropriator, especially when he repairs the same, the freehold and soil in the body of the church is in the vicar, as a part of his glebe, for thereof he takes possession at his induction."

The Constitution of Archbishop Stratford prohibits laymen from rooting up trees or mowing grass in churchyards of churches or chapels against the will of the rectors or vicars of such churches or chapels: on this Lyndwood remarks, that if in the same church there be both rector and vicar, it may be doubted to whom the trees or grass belong, "but I suppose they belong to the rector, unless in the endowment they are otherwise assigned."^b In Rol. Abr.^c it is said the trees in the churchyard belong to the vicar, because the vicar ought to repair the church. Dubitatur: Bellamie's case.^d In Heath v. Pryn.^e this case is cited as a decision that the vicar is entitled to the trees in the churchyard. In Runcorn v. Doe d. Cooper,^f it was considered that the freehold of the churchyard was in the vicar, and possession for 20 years of part of the churchyard adverse to his predecessor was held not to bar his right. If the right had been in the lay rector, it would, I apprehend, have

^a Watson, Clerg. Law, 400.

^b Lynd. 267.

^c 2 Rol. Abr. 337.

^d 1 Rol. Rep. 255.

^e 1 Vent. 15; see also Com. Dig. Ecclesiastical Persons, C. 14.

^f 5 B. and C. 696. 8 D. and R. 450.

been barred. Godolphin^a says that the freehold of the church and churchyard is in the parson, and the vicar may have trespass against a stranger, but not against the parson. Holroyd, J., in *Clifford v. Wicks*,^b says, "The rector (meaning the lay rector) has the freehold in the chancel, in the same manner as he has in the church and the churchyard." The decision in this case was that the rector had no right to alien the chancel. In *Jones v. Ellis*,^c Alexander, C. B., seems to think the freehold is in the rector, and not in the vicar. *Coussmaker v. Bishop of London*^d may also be cited in favour of the right of the rector. His obligation to repair the chancel does not prove that he has any estate in that or the church; the parishioners, who are bound to repair the church and churchyard, have no estate in them. This obligation is not a charge upon his estate in the chancel, but upon his estate in the rectory. The beneficial right to use the church being in all the inhabitants of the parish, they are bound to contribute towards its repair in proportion to their property in the parish, and the charge of repairing the chancel is by custom the proportion which the property of the rector ought to bear.

Whether he has or has not a legal freehold in the chancel, it is clear that his only right is to have for himself, his family, and tenants, the chief seat in the chancel, unless by prescription another parishioner has it.^e He has no power to alienate the

^a God. Rep. 186, 187.

^b 1 B. and Ald. 507.

^c 2 Y. and J. 273.

^d 2 Wood's Tithe Cases, 359. *Gregory v. Nuttall*, 2 Wood, 114.

^e *Hall v. Ellis*, Noy. 133. *Spry v. Flood*, 2 Curt. 356.

chancel by itself, or to grant to another the right to erect pews or make burying-places therein.* If he has the freehold, it is inalienably annexed to his rectory, which is more than can be said of the advowson to the vicarage or the rectorial tithes. They may be aliened for any period, to any number of persons, in any portions however small. In *Jarratt v. Steele*,^b the lessee of the impropiator of great tithes, having forcibly entered the church and erected pews, was condemned in costs, and admonished by the Court of Arches to pull down the seats and re-instate the chancel as it was. Sir John Nichol said, "All persons ought to understand that the sacred edifice of the church is under the protection of the ecclesiastical laws as they are administered in these Courts, and that the possession of the church is in the minister and churchwardens; that no person has a right to enter into it, except when it is open for Divine service, but with their permission and under their authority." In *Rich v. Bushnell*,^c it was held that the lay rector has no right to erect a monument, or affix a tablet, or make a vault in the chancel, without the leave of the ordinary: that to obtain such leave he must satisfy the ordinary that the rights of the parishioners to use the church for the celebration of Divine service will not be affected by the alteration: that the leave of the lay rector must precede the application for a faculty by another person: that the vicar has no power of interposing an absolute veto, though he may show cause against the grant.—

* *Clifford v. Wicks*, 1 B. and Ald. 498.

^b 3 Phil. 167.

^c 4 Hag. 164.

"Though the freehold of the chancel," said Sir John Nichol, "may be in the rector, lay or spiritual, as by a sort of legal fiction the freehold of the church is in the incumbent, and though the burden of repairing the chancel may rest on the rector, the use of it belongs to the parishioners for the decent and convenient celebration of the holy communion and the solemnization of marriage."

In *Walwyn v. Awberry*,^a it is said that the vicar may have a right to sit in the chancel because he comes in under the parson; and in Burn's Ecclesiastical Law,^b "The right of a seat in the chancel was originally inherent in every vicar." But the vicar cannot grant a licence for burying any person in or digging up the soil of the chancel.^c

Of Houses and
Buildings.

12. As well the ecclesiastical as the common law authorities distinguish between necessary repairs and repairs merely ornamental. An incumbent is bound to keep the residence house and buildings of his benefice in substantial repair, but is not bound to do ornamental repairs, or to keep in repair a thing merely ornamental.

The Constitution of Archbishop Edmund complains of rectors and vicars leaving the houses of the Church ruinous or decayed (*dirutas vel ruinosas*), (Lyndwood interprets *dirutas* as *totaliter prostratas*, and *ruinosas* as *de proximo vel verisimili casuras*), and provides that out of their ecclesiastical goods shall be deducted sufficient to repair such defects. On this Lyndwood remarks, that the repairs to be

^a 2 Mod. 257, 8.

^b Vol. i. p. 363.

^c *Coussmaker v. Bishop of London*, 2 Wood's Tithe Cases, 359. *Vide Gregory v. Nuttall*, 2 Wood, 114.

done ought to be according to the exigency and quality of the thing to be repaired, so that the expenses are incurred for necessary repairs, and not for matters of taste and ornament,^a (*ut scilicet impensæ sint necessariæ, non voluptuosæ.*)

The Legatine Constitution of Cardinal Othobon proposes to provide a remedy against the covetousness of divers persons, who, although they receive much substance from their benefices, neglect their houses and other edifices, and do not preserve them in repair or build them when fallen down (*integra ea non conservent, et diruta non restaurent*), and ordains and establishes that all clerks shall take care decently to repair the houses of their benefices as need shall require. (*Beneficiorum domos et cætera ædificia prout indiguerint reficere studeant condecenter.*) And archbishops, bishops, and other inferior prelates are enjoined that they do keep in repair their houses and other edifices by causing such reparations to be made as they know to be needful. (*Domos et ædificia sua sarta tecta et in statu suo conservare et tenere ut ipsi ea refici faciant quæ refectione noverint indigere.*) Anthon says that the repairs intended are necessary repairs; the Cardinal therefore does not refer to the restoration of a valuable picture of Parrhasius or Apelles, or other object of mere pleasure, (*nec de aliis voluptuosis impensis.*) On the word *condecenter* he remarks that the repairs must not be merely superficial, such as painting over rotten wood.^b

^a Lynd. 250, ed. Oxon. 1679. Gibs. Cod. tit. 32, c. 33, p. 789, ed. 1713.

^b Oth. Anthon. 112. Gibs. Cod. 789.

The nature of the repairs which an incumbent is bound to do to the houses and buildings attached to his benefice is illustrated by the case of *Wise v. Metcalfe*,^a where the law on this subject was most elaborately discussed. It was an action against the executor of a deceased rector by his successor for dilapidations of the rectory house, barns, stables, and outbuildings thereto belonging, and the chancel; and the question was, for what dilapidations he was liable. The rectory house was an ancient structure, built with timber, and plastered on the outside, and had upon it the date of 1624; the barns were also old, but not of equal age with the rectory house. The dilapidations were, by verdict of a jury, estimated at £399. 18s. 6d., subject to the opinion of the Court. The principle upon which the estimate was made was, that the former incumbent ought to have left the rectory house, buildings, and chancel, in good and substantial repair, the painting, papering, and whitewashing being in proper and decent condition for the immediate occupation and use of his successor; that such repairs were to be ascertained with reference to the state and character of the buildings, which were to be restored, where necessary, according to their original form, without addition or modern improvement. It was proved, by several surveyors of experience, that they invariably estimated the dilapidations between the incumbent of a living and the representatives of his predecessor upon this principle.

If the rectory house, &c., were to be repaired in the same manner only as buildings ought to be left

^a 10 B. and C. 299. 5 M. and R. 235. Mich. 1829.

by an out-going lay tenant, who is bound by covenant to leave them in good and sufficient repair, the expense of such reparation would amount to £310, the painting, papering, and whitewashing not being included.

If the former incumbent were only bound to leave the buildings wind and water tight, and in that condition which an out-going lay tenant not bound by covenant to do repairs ought to leave them, the expenses would amount to £75. 11s.

For the plaintiff it was argued—that the rector was bound to keep and leave the premises in a state of repair, even as to painting, papering, and whitewashing, befitting a person of his revenue; that the premises ought to be left in the same condition as that in which they ought to be kept, and that it would not suffice for the deceased incumbent to keep them merely wind and water tight. If so, it would be sufficient for his successor to keep them in the same state of repair; and the consequence would be, that they need never be in any better condition.

For the defendant it was contended—that the authorities did not distinguish between dilapidations and waste, and that the modes of proceeding by sequestration, deprivation, and prohibition, all contemplated and were exclusively applicable to cases of wilful misconduct or culpable omission; that the rector was entitled to the fair usufruct of the gradual consuming property; and 17 Geo. III. c. 53, was cited, by which the incumbent of a benefice, where there is no house, or the house is so ruinous that one year's produce of the living will

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not suffice to put it in repair, may, after having an estimate prepared, with the consent of the ordinary raise money to rebuild, by mortgage of the glebe, tithes, &c.

Bayley, J., delivered the judgment of the Court, and said —“ We are not prepared to say that any of the rules suggested are precisely correct, though the second approaches most nearly to that which we consider as the proper rule. The law and custom of England, as stated in some of the earliest precedents,^a is as follows:—‘ Omnes et singuli prebendarii, rectores, vicarii, etc., pro tempore existentes, omnes et singulas domos et edificia prebendarum, rectoriarum, vicariarum, etc., *reparare et sustentare* ac ea successoribus suis reparata et sustentata dimittere et relinquere teneantur: et si hujusmodi prebendarii, rectores, vicarii, etc., hujusmodi domus et edificia successoribus suis ut premittatur reparata et sustenta non dimisserint et reliquerint, sed ea irreparata et dilapidata permiserint, iidem prebendarii, etc., in vitis suis, vel eorum executores sive administratores, etc., post eorum mortem, successoribus prebendariorum, etc., tantam pecuniæ summam quantam pro reparatione aut necessariâ reedificatione hujusmodi domorum et edificiorum expendi aut solvi sufficiat, satisfacere teneantur.’

“ From this statement of the common law, two propositions may be deduced: first, that the incumbent is bound not only to repair the buildings belonging to his benefice, but also to restore and rebuild them if necessary; secondly, that he is

^a 12 & 13 Hen. VIII. Rot. 126. C. B. and 1 Lutw. 116.

bound only to repair, and sustain, and to rebuild, when necessary. Both these rules are very reasonable; the first, because the revenues of the benefice are given as a provision, not for a clergyman only, but also for a suitable residence for that clergyman, and for the maintenance of the chancel; and if by natural decay, which notwithstanding continual repair must at last happen, the buildings perish, these revenues form the only fund out of which the means of replacing them can arise. The second rule is equally consistent with reason, in requiring that which is useful only, not that which is matter of ornament and luxury.

“It follows, from the first of these propositions, that the third mode of computation proposed in the case cannot be the right one; because a tenant, not bound by covenant to do repairs, is not bound to rebuild or replace; the landlord is the person who, when the subject of occupation perishes, is to provide a new one, if he think fit. And if the second proposition be right, a part of the charges contained in the first mode of computation must be disallowed; for papering, whitewashing, and such part of the painting as is not required to preserve wood from decay by exposure to the external air, are rather matters of ornament and luxury than utility and necessity.”

His Lordship, after referring to the Constitution of Edmund, Archbishop of Canterbury, A. D. 1236, to Lyndwood's Commentary thereon, and the Legatine Constitution of Othobon, A. D. 1268, stats. 13 Eliz. c. 10, and 57 Geo. III. c. 99, s. 14, concluded thus:—“Upon the whole, we are of opinion the

incumbent was bound to maintain the parsonage (which we must assume upon this case to have been suitable in point of size and in other respects to the benefice) and also the chancel, and keep them in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; and that he was not bound to supply or maintain any thing in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay), and whitewashing, and papering belong; and the damages in this case should be estimated upon that footing. It will be found that this rule will correspond nearly with the second mode of computation, and probably will be the same, if matters of ornament and luxury are not taken into consideration."

The case was referred to the Master, to ascertain the amount, and he directed judgment to be entered for £ 369. 18s. 6d., an amount between the first and second estimates.

It is impossible to quarrel with the rules laid down in this case, though in determining that painting, papering, and whitewashing were matters of ornament and luxury, and not of utility and necessity, the Court, it may be thought, confined useful and necessary repairs within too narrow bounds. As one of the purposes for which the revenues of the benefice are given is to maintain a *suitable residence* for the clergyman, it may be said to be both useful and necessary for that purpose that the residence should be occasionally painted, papered, and whitewashed; yet as painting, paper-

ing, and whitewashing are mere cleansings, and evanescent in their nature, and do not at all add to the substantial comfort or soundness of the building, and as the quality of such repairs, and manner in which they should be done, are matters of taste, it is perhaps the more reasonable rule to consider them rather as ornamental than useful.

It may be inferred, from *Wise v. Metcalfe*, that the executors of a deceased incumbent are not merely bound to supply those parts of the rectory house, &c., which are actually worn out and become useless, and so far decayed as to place the building in immediate danger, but also to renovate all those parts which are in such a state as soon to become useless, and which a prudent man who had a perpetual tenure of the estate would have repaired before. An incumbent, on his institution, is entitled to have the rectory house, &c., in a sound and durable condition, so that he may not only be not charged for any repairs at his institution, but have no near prospect of repairs: thus all reasonable precautions to prevent decay must be taken, such as painting the outside wood-work where exposed to the weather.

Before the decision in *Wise v. Metcalfe*, a case was tried before Lord Chief Justice Best,^a in which the surveyor proved that he had made his valuation on the principle that the premises ought to be put in thorough repair, fit for the occupation of a gentleman; that he had included the expense of painting the rectory house twice in oil in the inside, and

^a *Percival v. Cooke*, Cambridge Summer Assizes, 1826. 2 Car. and Payne, 460.

three times on the outside, of taking off and renewing the old tiling and old lead of the roof; and further, as the window-frames were all in bad condition and old-fashioned, he had included the expense of putting in new windows in the modern style. The Chief Justice said, "This is all wrong. The surveyor has gone on the principle that the representatives of the late incumbent are bound to do every thing which an in-coming tenant would do. That is not law. They were bound to do no more than ought to be performed by an out-going tenant." And he concluded—"The executors of a deceased incumbent are, in fact, bound to do nothing more than to restore what is actually in decay, and to make such repairs as are absolutely necessary for the preservation of the premises."

This case was disputed by the counsel for the plaintiff in *Wise v. Metcalfe*; and the principle of that decision, it will be observed, is about equidistant from the estimate of the surveyor and the opinion of the judge, in *Percival v. Cooke*. Instead of the incumbent of a benefice being bound merely to leave the premises in the same condition as an out-going tenant should leave them, he ought to do all those substantial repairs which an in-coming tenant would do, but not those ornamental repairs and improvements which were included in the surveyor's estimate. The surveyor, therefore, was right in allowing for the replacing the old lead and tiling, but was wrong as to the inside painting and putting in new windows in the modern style; he ought merely to have calculated the expense of placing the old frames in a substantial condition.

The decision in *North v. Barker*,^a though cited by the counsel for defendant in *Wise v. Metcalfe*, is consistent with the judgment of the Court in that case. The question there was, as to the reasonableness of the surveyor's estimates for repairing the hospital of St. Cross. The surveyors for the incumbent stated £5327 as the sum due for dilapidations, while those concerned for the representatives of his predecessor calculated £3795 as due. Sir John Nichol thought the latter estimate the more reasonable, and made the following remarks on the incumbent's surveyor's valuation :

"I have looked through the survey, and the statement does impress my mind to have been made on a very large scale. It looks like renovating the building, not only in its ancient form, but in its pristine beauty. There has been an estimate for relaying all the old pavement. In some instances it seems as if things were to be added which were never there before. I think this is going beyond the principle; for, *although these Courts carry the point far as to the incumbent's house*, they will not go so far as to buildings of this sort. The stone-work of fine old windows is decayed; this is serious, when the obligation to repair them occurs. There must be some moderation. The thorough repair of an old building is not to fall all on one incumbent. This last incumbent received £450 for dilapidations; he laid out £2220 during his incumbency, which was twenty years, and £500 within the last five years."

The principle to be extracted from this case is,

^a 3 Phil. 307. Arches Court, Trin. 1810.

Public
Building.

that an incumbent is bound to keep his dwelling-house and appertaining buildings, which are beneficial to himself personally, in thorough repair; but where the burden of repairing a public building is imposed on him, his obligation is satisfied if he expend a reasonable portion of his revenue for such a purpose.

Dilapidations
in time of
Predecessor.

13. The obligation on the incumbent to keep and leave his dwelling-house, &c., in thorough repair, is absolute and unqualified. He is liable not merely for the dilapidations which the premises have sustained during his own incumbency, but for those which have occurred in the time of his predecessor. This, in some cases, may operate with hardship, as when an incumbent dies insolvent, and the successor occupies the benefice but for a short time.* The ‘*Reformatio Legum Ecclesiasticarum*’^b proposed that the duration of the possession should be taken into consideration: if less than one year, nothing should be required; if more, then the equity of the ecclesiastical judge should proportion the compensation for dilapidations to the length of possession.

In the case of *Bird v. Relph*,^c before referred to, it was objected that the Commissioners, who were in the first instance bound well and sufficiently to fence the land, had never done so in a proper manner. This the Court held to be no excuse, since the vicar might, by mandamus, have compelled them to put up substantial fences.

* *Gibs. Cod. tit. 32, c. 3, p. 792. Ayliffe Parer. 219. Conset. 362. Opin. of Sir Wm. Scott. 2 Burn's Ecc. Law, 153, a.*

^b *Fo. 39, a.* ^c *2 Ad. and El. 773. 4 Nev. and Man. 878.*

Considering the precautions of the ecclesiastical law in compelling an incumbent to maintain his buildings in repair, and the remedy the successor has against his predecessor, less inconvenience results from this rule than would, if the contrary were established; and the power of borrowing under the Gilbert Act, 17 Geo. III. c. 53, is calculated greatly to mitigate its rigour.

14. For dilapidations happening after the expiration of his incumbency, the incumbent or his representatives are not liable.^a When the vacation is short, and the survey of dilapidations made, as it ought to be, immediately after the successor's induction, the predecessor will, except under special circumstances, be charged with the whole amount of the survey, since it is not to be presumed that any fresh dilapidations have taken place since his cession. But where a long time has elapsed between the termination of the incumbency and the survey by the successor, as three or four years, a proportional deduction will be made for the decays which may reasonably be supposed to have happened during the intermediate time.^b

Magna Charta, c. 5, and the statutes 3 Edw. I. c. 21, and 14 Edw. III. stat. 4, c. 4 and 5, provide that waste shall not be committed to the temporalities of bishoprics during vacation, by the executors or other keepers to whom the King may have intrusted their custody.

15. By the authorities already referred to, it appears that where the rectory house falls down,^c

Dilapidations
during
vacancy.

Obligation
to rebuild.

^a Gibs. Codex, tit. 32, c. 3, p. 792.

^b Clarke, tit. 126. 1 Ought. 255.

the incumbent is, by the common law, bound to rebuild; and whether the house fall down by natural and inevitable decay, or be destroyed by unavoidable accident, as by fire or tempest, there is an absolute obligation on the incumbent, in whose time such accident happens, to rebuild, as against his successor. "It is certain," says Willes, C. J.,^a "that if a parsonage or vicarage house be burned down, there must be some way of rebuilding it, for necessity sake and the good of the public; for there must be parsons and vicars, and they must have houses to live in: it follows, that when they are burned down, they must be built up again. If a suit in the Ecclesiastical Court be brought ex officio in the lifetime of the incumbent, Dr. Paul informed us that the constant rule is, to order a fifth part of the profits of the living to be set apart in order to rebuild the house.^b This must plainly be, from necessity sake, when the incumbent is in no default." This is an equitable relief to the incumbent, but does not qualify his legal obligation to his successor, and, therefore, if he die or resign before completing the re-edification, he or his estate is liable to the whole amount necessary to complete the work, though he may have regularly set apart one-fifth of his income for that purpose.

Right to alter. 16. The obligation is to rebuild and restore, not to improve; and if the house become so dilapidated as to be irreparable, the law only requires the parson to build another of the same style and size. It is a question, however, whether he *may* not build a

^a Sollers v. Lawrence, Willes, 420.

^b See also North v. Barker, 3 Phil. 307, per Sir J. Nichol.

house of a different size and style, or make alterations in a house already standing; and as the parson is the only person having any beneficial interest in the house, it would seem that he may make alterations, or may build a house different in size and style from the former one, provided he do not diminish the value of the house, or build in a size and style unsuitable to the living. And although I have not found it any where stated as necessary, yet convenience requires that where a parson wishes to alter or rebuild, he should do it under the sanction of his bishop. In the Appendix to Gibson's Codex there are two precedents, one of a faculty from Abbot, Archbishop of Canterbury,^a for taking down and rebuilding the episcopal palace of Rochester; another of a faculty from Archbishop Sancroft, made after an inquiry and return, for rebuilding and altering a vicarage house,^b and directing the manner in which it should be rebuilt. The maxim is, "*Ecclesiæ suæ conditionem meliorem facere possunt sine consensu, deterio-rem non possunt sine consensu.*"^c This maxim prohibits any alteration to the deterioration of the house. It also prohibits any alterations which would increase the value of the house as a house, yet would render it unsuitable as the residence of a person having only the revenues of the living to subsist upon; since such alteration would impose an additional and unnecessary charge for repairs, and thereby lessen the value of the benefice.

17. In *Wise v. Metcalfe* the Court assumed that ^{Unsuitable Residence.}

^a P. 36.

^b P. 40.

^c Co. Lit. 102, b. Co. Lit. 2, b. 11 Rep. 49, *Liford's case*.

the house and buildings were suitable to the benefice. But supposing a house to be unsuitable,—that is, too large for the benefice to which it is attached,—is an incumbent bound to do all or any repairs? This is a question not easy to solve; but as it is more beneficial to the church that there should be a residence, though too large, than that there should be none,^a the incumbent would, by the rule before stated, be bound to keep the house in repair; though, if there were any distinct building unnecessary and unsuitable, or any separable part of the house of that description, he might not be charged for the dilapidation of such thing.

Fixtures. 18. An incumbent is only bound to repair those parts of his house and other buildings which by law are part of the endowment of his benefice. If by fixing a particular article to his residence for his personal convenience or pleasure he does not endow the benefice with it, he is not bound to repair it; and he or his executors, after his death, may separate it from the house: it continues, notwithstanding its annexation, his personal property. The rights and liabilities of an incumbent as to fixtures do not appear ever to have been brought into question before the Courts; and it is only from analogy to the decisions in the cases of other tenants that any opinion can be formed on the subject. Bishop Gibson^b and Dr. Burn,^c referring to the cases which have been decided between the heir and executor of

^a Every church of common right is entitled to a house and glebe.—Gibbs. Cod. tit. 30, c. 2, p. 689.

^b Codex, 752, 2nd edit.

^c Eccles. Law, tit. Wills, vi. vol. iv. p. 413.

a tenant in fee, say that where an incumbent has fixed to his parsonage, hangings, grates, iron backs to chimneys, or such like things, they shall be deemed as furniture or household goods, and go to his executor. A parson being tenant for life, and under no obligation to add to or improve his residence,^a it may safely be inferred that things which when fixed by a tenant in fee continue personal estate and pass to his executors, will not, when fixed by a parson, become the property of the Church. Thus *Squire v. Mayer*,^b where it was held that a furnace, though fixed to the freehold and purchased with the house and hangings, nailed to the walls, belonged to the executor, and not to the heir;—*Beck v. Rebow*,^c in which it was decided that hangings and looking-glasses, fixed to the walls with nails and screws, and which were as wainscot, there being no wainscot underneath, were only matters of ornament and furniture, and not to be taken as part of the house or freehold;—and *Harvey v. Harvey*,^d in which the executor of a tenant in fee recovered in trover against his heir, hangings, tapestry, and iron backs to chimneys;—are authorities in favour of the right of the executor of an incumbent to fixtures of a similar description. It is difficult to reconcile these cases with others relating to fixtures erected by a tenant in fee. Pictures and glass, fixed in the wainscot of the dwelling-house, and coppers and furnaces, were decreed to go along with the house, and be taken as part thereof, and not to be

^a *Wise v. Metcalfe*, 10 B. and C. 316, *ante*, p. 22.

^b 2 Freem. 249. 2 Eq. Cases, Abr. 430.

^c 1 P. Wms. 94.

^d 2 Str. 1141.

personal estate.^a Set pots, ovens, and ranges, fixed by a tenant in fee, have been held not seizable as his personal property by the sheriff,^b—stoves, closets, shelves, brewing vessels, locks, and blinds, passed to the purchaser in a conveyance of the house.^c A stove, cupboards, and grates, were valued as part of the house in assessing it to the poor's rate.^d And it is stated in a text-book of the highest authority, that the law is by no means clearly settled respecting the right of the executor of a tenant in fee to fixtures set up for ornament or domestic convenience.^e The case of the executor is not strengthened by the recent decision of the House of Lords,^f that the executor of a tenant in fee is not entitled to fixtures erected for the purposes of trade, the authority of the cider-mill case being denied. Altogether, therefore, the position that the executor of an incumbent is entitled to the same fixtures as the executor of a tenant in fee, is not of much value to the executor of the incumbent.

It is not easy to discover a reason why an ecclesiastical tenant for life should have a more limited right to fixtures than a lay tenant for life. The ecclesiastic is under no obligation to annex the fixtures, and there is no more reason to presume that he intends absolutely to part with the property of

^a *Cave v. Cave*. 2 Vern. 508. 1 Wms. on Exors. 580, n.

^b *Winn v. Ingilby*, 5 B. and Ald. 625.

^c *Colegrave v. Dias Santos*. 2 B. and C. 76. 3 D. and R. 255.

^d *Rex v. St. Dunstan*, 4 B. and C. 686. 7 D. and R. 178.

^e 1 Wms. on Exors. 582.

^f *Fisher v. Dixon*, 12 Cl. and Fin. 212.

articles which, for his convenience or pleasure, he fixes to his residence, and which can be removed without injury to the building, than if he were a lay tenant for life. It is remarkable that no case is reported relating to the right of a lay tenant for life to domestic or ornamental fixtures. Considering that he is rendered liable for waste by the same statute as is a tenant for years, and that no distinction is made between their cases; that the right to remove fixtures is a relaxation of the law of waste; that the connexion between him and the remainderman is not necessarily greater than between a landlord and tenant for years; and that there is no decision establishing a different rule as to fixtures in cases between landlord and tenant, and between tenant for life and remainderman,—it may be inferred that a tenant for life, and his executor after his death, is entitled to remove the same description of fixtures as is a tenant for years. The cases as to the right of a tenant for years to fixtures are stated in the subsequent chapter.

The note of Anthon, already referred to, that the restoration of a valuable picture of Parrhasius or Apelles, or other luxurious expense, is not included in the Constitution of Othobon, ‘*De domibus ecclesiarum reficiendis*,’^a may be considered as an authority for holding that an incumbent is not bound to repair a fixture merely ornamental, even if erected by his predecessor, and that he or his executor may remove such fixture, if erected by himself.

The widow of a deceased incumbent may occupy the residence for two calendar months after his de-

^a Oth. Anth. 112.

cease.* Perhaps such would be a reasonable time for his executors to remove any fixtures they may be entitled to.

Dr. Burn says,^b "If an incumbent enter upon a parsonage in which are hangings, grates, iron backs to chimneys, and such like, not put up by the last incumbent, but which have gone from successor to successor, the executor of the last incumbent shall not have them, but it seems they shall continue in the nature of heirlooms." He cites no authority. If the executor of an incumbent who has set up useful fixtures does not claim the right to remove them, it may be presumed that the incumbent intended to endow the benefice with them, and they may therefore become a part of residence, which the succeeding incumbents are bound to repair.

In the Bishop of Carlisle's case, it appeared that the ornaments of the chapel of a preceding bishop belong to the succeeding bishop, and are held in succession, although other chattels in the case of a sole corporation belong to the executors of the deceased, and do not go in succession.^c

From 5 & 6 Vict. c. 26, s. 9,^d it appears that fixtures, pictures, books, and other goods and chattels, in some cases belong to bishops and deans in right of their dignities; and by s. 10, if fixtures, fittings, and other articles are bought with monies provided under the authority of the Act, and are set forth in an inventory in writing certified under the common seal of the Ecclesiastical Com-

* 1 & 2 Vict. c. 106, s. 36. ^b Eccles. Law, vol. iv. p. 413.

^c 21 Edw.-III. 48. 12 Rep. 105, Corven's case.

^d See the provisions of this stat. *post*, s. 20, p. 44.

missioners, and registered in the registry of the diocese, they are to be deemed to all intents and purposes as much part and parcel of the freehold of the house as any fixtures can by law be.

19. By the statutes of Ely Cathedral, the dean ^{Materials.} and chapter were bound to provide the materials for the repair of the prebendal houses. In an action by one prebendary against his predecessor for dilapidations, the defendant was only charged the price of the workmanship, and not for the value of the materials, the plaintiff being at liberty to call on the dean and chapter to provide materials, and the obligation to provide them being a charge upon the Church.^a In *Percival v. Cooke*,^b the plaintiff had repaired the rectory house with timber growing on the glebe in the time of the late incumbent. Best, C. J., held that the defendants were entitled to an allowance for the timber in the estimate of the repairs. It may be inferred perhaps from *Radcliffe v. D'Oyly*, that whenever there is timber on the glebe which may properly be felled for repairs, the preceding incumbent is not chargeable with the cost of materials. Such costs are a charge on the benefice itself; the incumbent is not in default for the omission to provide materials, nor is his successor injured by being obliged to purchase materials.

20. Several provisions have been made by statute for building houses where there are none, and rebuilding and repairing those which are much dilapidated, by which an incumbent can throw part of

<sup>Borrowing
Money for
Repairs.</sup>

^a *Radcliffe v. D'Oyly*, 2 D. and E. 630.

^b 2 Car. and Payne, 460.

the burden of extensive repairs on his successors, and the cost of repairs is made more directly a charge upon the revenues of the benefice than it was by the common law.

By the 17th Geo. III. c. 53, called the Gilbert Act, (which applies to parsons, vicars, and other incumbents of livings, parochial benefices, chapelries, and perpetual curacies under the jurisdiction of the bishop or other ecclesiastical ordinary,) where there is no house, or where the house is so dilapidated that one year's net income of the benefice is insufficient to put it in repair, the incumbent may, with the consent of the patron and ordinary, (or in the case of a chapelry or perpetual curacy, with the consent of the rector or vicar also,^a) raise money for the purpose of building, rebuilding, or repairing the house, by mortgaging the property of the benefice for twenty-five years.^b If the incumbent has been non-resident for twenty weeks, the ordinary may, with the consent of the patron, raise the money.^c The ordinary, patron, and incumbent are also empowered to purchase a house and land where a new building is necessary.^d Interest at the rate of five per cent., and ten per cent. off the principal, is to be paid annually. The incumbent is to insure in one of the public offices in London or Westminster against accidents by fire, in such sum as the ordinary, patron, and incumbent agree upon. In default of payment of principal or interest, or of making insurance, the living may be sequestered.^e Before the ordinary consents to

^a 17 Geo. III. c. 53, s. 17.

^b S. 1.

^c S. 8.

^d S. 10.

^e S. 6.

money being borrowed, he is to cause inquiry to be made and certified by the archdeacon, chancellor, or other proper persons living in or near the parish, as to the condition of the buildings at the time the incumbent entered upon the living, and of the money he has received or is entitled to receive for dilapidations; and if it appear that dilapidations have been caused by the wilful neglect of the incumbent, the ordinary may require him to pay the amount of such dilapidations before he consents.^a By 1 & 2 Vict. c. 23, the incumbent may raise on mortgage any sum not exceeding three years' net income, for any of the purposes of the Gilbert Act, or for purchasing a site for a house.^b With the consent of the bishop, the residence may be converted into a residence for the farmer of the glebe lands, or into farm buildings;^c or, with the consent of the bishop and patron, it may be sold, and the money applied to buy or build another house.^d By 1 & 2 Vict. c. 106, (which applies only where benefices have been avoided since the 14th August, 1838,) the bishop, upon the report of Commissioners that there is no fit house of residence, and that the annual profits of the living exceed £100, may raise money by mortgage on the glebe, &c., for twenty-five years, for the purpose of providing a convenient residence. The incumbent is bound to insure the buildings, when completed, against fire, at one of the public offices in London or Westminster, at such sum as the bishop appoints;^e and the bishop may, if new buildings are necessary, purchase a

^a S. 5.^b 1 & 2 Vict. c. 23, s. 1.^c S. 6.^d S. 7.^e 1 & 2 Vict. c. 106, s. 62.

house and land.^a A difficulty has arisen in the execution of this Act, the bishop not being empowered to enter or take possession of the glebe land. In a case where an incumbent refused to permit the Bishop of Norwich to build upon his glebe land, he considered that he was unable to proceed.^b

Some statutory provisions have also recently been made as to the residences of bishops, deans, and canons; a reference to which will render the view of the law on this subject more complete. In 6 & 7 William IV. c. 77, s. 1, the recommendation of the Ecclesiastical Commissioners is recited: "That fit residences be provided for the Bishops of Lincoln,^c Llandaff, Rochester, Manchester, and Ripon;^d and that for the purpose of providing the bishop of any diocese with a more suitable and convenient residence than that which now belongs to his see, sanction be given for purchases or exchanges of houses or lands belonging to the respective sees, and also for borrowing by any bishop of a sum not exceeding two years' income of his see: That a sum of £4000, with accumulations, less proper expenses, recovered by the Bishop of Bristol for damages done to his episcopal residence, together with the money arising from the sale of the site of residence, be applied for the purchase or erection of a residence for the Bishop of Gloucester

^a S. 70.

^b *Black v. Hodgson*, 11 Jurist, 191.

^c Carried out by Orders in Council, 4th April, 1838; 29th May, 1840; 1st April, 1841.

^d Orders in Council, 11th Dec. 1837; 11th July, 1839; 1st April, 1841; 22nd Feb. 1842.

and Bristol.”^a The Commissioners are by the statute incorporated, and provision is made for carrying out their recommendations by Orders in Council.

By 2 & 3 Vict. c. 18, an archbishop or bishop was empowered to raise money by mortgage for the purpose of taking down and rebuilding, repairing, adding to, altering, or improving any palace or mansion-house, offices, or outbuildings belonging to his see, or of building a new palace on a new site, or purchasing a freehold house for residence, or land for a site within his see. This statute has been repealed by 5 & 6 Vict. c. 26, except as to existing mortgages.

By 3 & 4 Vict. c. 113, which provides for alterations in cathedral and collegiate bodies, deans and chapters were empowered to dispose of the residence houses attached to any dignity, office, or prebend in their cathedral or collegiate churches which might not longer be required.^b This enactment has been repealed by 4 & 5 Vict. c. 39, s. 18, which provides that any dean and chapter may, with the consent of their visitor, sanction the exchange of houses of residence, or may assign any vacant house to any canon willing to accept it; and that houses no longer required by any canon may, by the dean and chapter, be disposed of, with the consent of their visitor and the Ecclesiastical Commissioners.

^a Order in Council, 3rd April, 1840.

^b S. 58. Orders in Council of 3rd Dec. 1840, as to house at Canterbury; 25th Feb. 1841, as to house at Lichfield; same date as to house at Worcester; and 1st April, 1841, as to house at Rochester, relate to such houses.

The Ecclesiastical Commissioners may empower any dean or canon to raise money for the purpose of building, enlarging, or otherwise improving his residence house, under the provisions of 1 & 2 Vict. c. 23.^a

By 5 & 6 Vict. c. 26, any episcopal residence may, by an Order in Council, on the recommendation of the Ecclesiastical Commissioners, and the consent of the bishop, be sold or taken down, and the site and materials sold, or added to, altered, improved, taken down, and rebuilt; or the demesnes adjoining the house may be improved by the purchase of land in the immediate neighbourhood, or within view thereof, or a new episcopal house may be built.^b The dean and chapter, or dean or canon, may, under the authority of an Order in Council, purchase the episcopal house, and add to, alter, improve, or take it down and build one or more houses on its site; or apply the site, or any part of it, in the improvement of the cathedral or its precincts; and for such purpose may raise money under 3 & 4 Vict. c. 113.^c The episcopal house may be made the deanery, or the residence of any canon, and the house of the dean or canon may be disposed of.^d

When any house is sold or taken down under the Act, directions are to be given for the sale of any fixtures or articles of furniture belonging to the owner in right of his dignity, if unfit for removal; and also for the removal to the new houses, of all pictures and books, and other fixtures,

^a 3 & 4 Vict. c. 113, s. 59.

^b S. 1.

^c S. 5.

^d S. 6.

goods and chattels, that are fit for removal, and for the deposit and care of them there, in conformity as nearly as may be with the cases to which they were 'previously applicable.'^a All fixtures, fittings, and other articles paid for out of monies provided or raised under the authorities of the Ecclesiastical Commissioners' statutes, and which are to be set forth in an inventory under the common seal of the Commissioners, and registered in the registry of the diocese, are to be deemed part and parcel of the freehold of the house, as much as any fixtures can by law be.^b

It may be directed that any house purchased, built, rebuilt, added to, altered, or improved under any of the above Acts, shall be insured against fire by the bishop, dean, or canon in the occupation thereof, in such office or offices, in such sum or sums, as shall be deemed fit; and the house shall be insured accordingly, and the receipt for every premium delivered to the Commissioners within fourteen days after the premium shall become due; and it may be directed that the money to be received under the insurance, in case of loss or damage by fire, be deposited, in trust, to be applied towards the rebuilding or repairing and re-instating the house, and to direct in what manner the money, with accumulations, shall be applied to such last-mentioned purpose.^c

21. Timber is called the dower (or part of the endowment) of the Church. It constitutes a fund for the repair of buildings and fences, and cannot

Obligation as
to Timber.

^a 5 & 6 Vict. c. 26, s. 9.

^b S. 10.

^c S. 11.

be felled except for such purpose, or when decayed. Every endowed ecclesiastic is under the same obligation as to timber. In 14 Hen. III. the Archbishop of Dublin was fined 300 marks for disafforesting the forest of his archbishopric.^a In 3 Edw. I. a prohibition issued out of Chancery against an abbot to prevent the destruction by him of the woods of his priory.^b In 35 Edw. I. complaint was made to Parliament that Anthony Beak, Bishop of Durham, wasted the woods belonging to his church by giving, selling, ill keeping, erecting forges of iron and lead, and burning coals. It was answered that he should be prohibited by writ out of Chancery, directed to him and his servants, commanding them not to do such waste.^c In Brooke's Abridgment^d it is said, if a bishop, archdeacon, parson, or the like, abate all the woods on his land, he shall be deposed as a dilapidator. In *Stockman v. Wither*,^e it appears that the defendant in an action of trespass justified cutting down trees by the authority of the Bishop of Salisbury; and Lord Coke is reported to have said, "A bishop is only

^a Rot. Patent, 14 Hen. III. M. 8, cited 11 Rep. 49, b, Liford's case.

^b 2 Rol. Abr. 813.

^c Cited in the following books: 1 B. and P. 109, *a. Jefferson v. Bishop of Durham*. Liford's case, 11 Rep. 49, *a.* 1 Rol. Rep. 100. Magdalene College case, 11 Rep. 72, *b.* 1 Rol. Rep. 167. *Stockman v. Wither*, 1 Rol. Rep. 86. 2 Bulst. 279. *Knowle v. Harvey*, 1 Rol. Rep. 335.

^d Tit. Deposition, plac. 1, referring to 2 Hen. IV. 3. Cited in Liford's case, 11 Rep. 49, *b.*; and in *James Bagg's case*, 11 Rep. 98, *b.*

^e M. 12 Jac. I. 2 Bulst. 279. 1 Rol. Rep. 86. Godb. 259, nom. Bishop of Salisbury's case.

to fell timber for building, for fuel, or for his other necessary occasions. The woods of the bishopric are called the dower of the Church, and are always carefully to be preserved; and if he fell and destroy this, upon motion to us made here we will grant a prohibition: and so it shall be also in the case of a dean and chapter, in which cases upon this ground we will grant prohibitions." This case is variously reported; and although according to Godbolt's Report it was held that a prohibition would not lie, all the reports agree as to the obligation of the bishop not to fell timber.

In the Bishop of Winchester v. Wolgar,^a an injunction was granted by the Court of Chancery to prohibit the defendant, who held a manor belonging to the bishopric, under a lease granted by a former bishop, and confirmed by the dean and chapter, without impeachment of waste, from felling timber, except such as was necessary for the rebuilding and repair of buildings on the estate, and should be assigned to him by the bishop's officers. In Acland v. Atwell,^b a prohibition was awarded by the Court of Chancery at the instance of the patron of a prebend against the prebendary, to prevent the defendant committing waste or spoil upon the house, lands, woods, or trees belonging to the prebend: a writ of assistance also issued, directed to the plaintiff. The plaintiff afterwards moved for an attachment, because, as he alleged, the defendant, after being served with the

^a 5 Car. I. 3 Swanst. 493, *note*.

^b A. D. 1630. 3 Swanst. 499, *note*. 2 Rol. Abr. 813, tit. Waste.

prohibition, had rooted up timber trees. The defendant alleged that he had only appointed one timber tree to be felled, which he appointed for the reparation of his house. The plaintiff said that he had sold the tree so felled, and had felled others. In *Jefferson v. Bishop of Durham*,^a application was made to the Court of Common Pleas for a prohibition to the bishop and his lessee against felling timber; and although the Court decided that they had no jurisdiction to grant the writ, the judgments of Eyre, C. J., and Rooke, J., may be referred to as expounding the law relating to the rights of ecclesiastics to timber. Eyre, C. J., said, "Most certainly it is not to be concluded that, provided an increase of the annual revenues of the see is obtained, a permanent fund of real property in woods may be utterly destroyed. Few who know the Honourable and Right Reverend Prelate, who have been witnesses to the munificence which he has displayed in repairing and beautifying the fabrics of his church, of his castles, and his palaces, will suspect him of having intentionally wasted the possessions of the See of Durham. At the same time it is by no means impossible that he, as well as many other churchmen, may unwarily have slid into this heavy ecclesiastical offence, which all agree to be a cause of deprivation, and which may probably be found to be also an injury cognizable by some of the King's temporal courts. I do not at all regret the expense of time and trouble in this proceeding, since I cannot but think it may be productive of very good effects. It may awaken men's

^a 1 B. and P. 105, M. 1797.

minds to the consideration of this sort of question, to which, at this time, it is of importance that they should be directed. We have already seen one cathedral church almost in ruins; and we have seen with what expense and exertion, both of the clergy and laity, that church was restored. Had it been in the minds of the clergy and laity for a course of years past, that the woods of bishops, and more especially of deans and chapters, including prebendaries, were a solid, permanent, and increasing fund of real property, devolved to them for the sustentation of the cathedrals, the palaces, and houses of the Church, probably that venerable edifice might never have fallen into such ruin, or might have been restored with much less difficulty. I am afraid that the state of some other noble monuments of the finest Gothic architecture in this kingdom is not very consoling; that they are mouldering and crumbling into ruins. I have heard it observed with great and serious regret, that no funds have been appropriated for the preservation of them. Perhaps the time will come when that which I take to be an error will be corrected, and when it will be found that all the property of the Church is a fund for the sustentation of those fabrics; but that the woods in particular are a specific fund so to be employed, no man can doubt." And Rooke, J., said, "As a general principle, it is waste to destroy woods: but these great officers have duties annexed to their station,—as the repairs of the palaces, bridges, and mansion-houses of the see; and they would not exceed the limits of their duty if they applied the woods to the repairs of

their cathedrals. If, through the forbearance of their predecessors, the woods belonging to the Church are in such a state that it is advisable to cut them down, this may be done very beneficially for the see, by cutting only a part one year and a part another, and at the same time planting so as to create a renewal of this kind of property. But it may be doubted whether a bishop can grub up the woods at all without the licence of Parliament."

In *Wither v. the Dean and Chapter of Winchester*,^a a bill was filed by a lessee of the Dean and Chapter to prevent them felling timber on the lands demised, they having covenanted not to fell, except for the necessary repairs of the cathedral and church buildings thereto belonging. The defendants said that all the timber growing on the estate would not suffice to repair the cathedral, and they required the timber they had cut for that purpose; and for this cause Lord Eldon dissolved an injunction which had been obtained by the plaintiff. He decided that deans and chapters had the same limited right to timber as other ecclesiastical bodies. He expressed a doubt whether they could take all the timber growing on the land, although it might be necessary for repairs, since otherwise there would be left no timber for the like purposes thereafter; but decided that the plaintiff could not object to this, because he was an uninterested stranger, except so far as he derived any right or interest under his agreement. He also seemed to think, referring to a dictum of Lord Hardwicke^b to the same effect,

^a 1817. 3 Mer. 421. ^b Ambler, 176, *Knight v. Moseley*.
See also *Attorney-Gen. v. Geary*, 3 Mer. 522.

that ecclesiastics were not bound to apply the timber cut specifically as materials for repairs, but that they might sell the timber to raise money for repairs. He said, "The obligation imposed upon them would tend greatly to defeat the general intention of the law that the possessions of the Church shall constitute a fund for the maintenance of the Church, if ecclesiastical bodies are compelled in every instance to apply the identical timber by removing it from the most distant parts of the country in which it may happen that their property lies." In *Herring v. the Dean and Chapter of St. Paul's*,^a the plaintiff, who was lessee to the defendants of some woods, filed a bill for an account of timber trees which the defendants had taken from the woods demised, and to which the defendant contended he was entitled. The Master of the Rolls (Sir Thomas Plumer) decided against the plaintiff, because, amongst other reasons, the property belonging to an ecclesiastical corporation, they had but a qualified right to the timber. They might fell it for repairs, and apply either the timber itself or its price for that purpose, but they had no authority to cut it down and divide the produce among themselves. Although these authorities establish that ecclesiastics may sell timber and apply the money realized in the purchase of other timber for the purpose of repairs, they do not warrant a wider conclusion. It cannot be inferred from them that ecclesiastics can sell their timber for the purpose of paying for labour, or purchasing

^a 1819. 3 Swanst. 492.

materials of another sort, such as stone or brick. The observation of Lord Eldon, that it may be more economical for them to sell the timber felled, and buy other where it is growing in a distant part of the country, tends to the contrary conclusion. When their estates do not furnish the materials necessary for repairs, it may be that they must provide them out of their ordinary revenues.

Trees in
Churchyard.

22. Trees growing in churchyards are planted for the ornament or shelter of the church. They are applicable only to the repair of the chancel, or, with the consent of the incumbent, they may be used for the repair of the nave of the church. Although the legal property is in the incumbent, the churchwardens, on behalf of the parishioners, have a sufficient interest in them to prevent him improperly felling them. The parson is restrained from taking these trees by the statute 35 Edw. I. stat. 2, "Ne rector prosternat arbores in cœmetrio," which is as follows:—"Because we do understand that controversies do often grow between parsons of churches and their parishioners, touching trees growing in the churchyard, both of them pretending that they belong unto themselves, *we have thought it good rather to decide this controversy by writing than by statute.*" Forasmuch as a churchyard that is dedicated is the soil of a church, and whatsoever is planted belongeth to the soil, it must

^a So translated in the Statutes at large. The Latin is, 'Hujusmodi altercationis dubium declarare juris sacri potius quam statuti juris estimamus;' which may be translated, 'We think this dispute may be more properly decided by the ecclesiastical law than by statute.'

needs follow, that those trees which be growing in the churchyard are to be reckoned among the goods of the church, the which laymen have no authority to dispose; but, as the holy Scripture doth testify, the charge of them is committed only to priests to be disposed of!

“And yet, seeing these trees be often planted to defend the force of the wind from hurting of the church,^a we do prohibit the parsons of the church, that they do not presume to fell them down unadvisedly, but when the chancel of the church doth want necessary reparations. Neither shall they be converted to any other use, except the body of the church doth need like repair, in which case *the parsons*^b of their charity shall do well to relieve the parishioners, by bestowing upon them the same; which we will not command to be done, but we will commend when it is done.”

This statute is called by Lord Coke a treatise rather than a statute, and said to be in affirmance of the common law.^c

In Bellamie's case,^d a lay rector had cut down trees growing in the churchyard, and the vicar sued him in Spiritual Court for damages. Because the suit was for damages, a prohibition was granted; and Lord Coke said, “A parson cannot cut down

^a “Low as churches were built at this time, the thick foliage of the yew answered this purpose better than any other tree.”—Barrington, ‘Observations on Ancient Statutes,’ 150.

^b Original, ‘rectores parochiarum indigentium,’—‘rectors of poor parishes.’

^c Liford's case, 11 Rep. 49; but see 1 B. and P. 108.

^d M. 13 Jac. I. 1 Rol. Rep. 255.

trees growing in the churchyard, except for the repair of the church." In *Knowle v. Harvey*,^a a vicar had lopped and cut down timber trees growing in the churchyard. The churchwardens moved the Court of King's Bench for a prohibition to restrain him from felling more; which was granted. Lord Coke said it was a good cause of deprivation. According to Degge,^b a rector who cuts down trees contrary to the statute may be indicted and fined at common law. From Atkyns' Report of *Strachy v. Francis*,^c it appears an injunction was moved at the suit of the patron against the rector, to stay waste in cutting down timber in the churchyard, and that Lord Hardwicke said a rector may cut down timber for the repairs of the parsonage house or the chancel, but not for any common purpose; and this he may be justified in doing under the statute of 35 Edw. I. If it is the custom of the country, he may cut down underwood for any purpose; but if he grubs it up, it is waste. He may cut down timber for repairing any old pews belonging to the rectory, and is entitled to necessary botes for repairing barns and outhouses. It is said an injunction was granted, until the hearing of the cause, to stay the rector from cutting down timber, except in the particular instances before mentioned. Although the above observations of Lord Hardwicke are correct as applied to timber generally, they are not so as to timber growing in the churchyard, the statute only allowing it to be applied towards the

^a H. 13 Jac. I. 3 Bulst. 158. 1 Rol. Rep. 335.

^b Parson's Counsellor, 100.

^c Nov. 12th, 1741. 2 Atk. 217.

repair of the chancel or the church. In *Cox v. Ricroft*,^a Sir George Lee decided that the herbage in the churchyard and the lopping of the trees belonged to the rector; he said the statute 35 Edw. I. did not prohibit the parson from lopping the trees, but only from cutting them down, and that if he was prosecuted upon that statute it should be by indictment at common law.

The Constitution of Archp. Stratford^b is levelled against the parishioners felling such trees: "Because as well by the canon as the civil law, laymen are prohibited to dispose of ecclesiastical things; and in order utterly to abolish the scandal of the usurpation of certain parishioners of parishes within our province, who, either ignorant of the limited nature of their rights, or arrogantly disregarding their obligations, have, of their own authority, felled, rooted up, and mowed the trees and herbage growing in the cemeteries of churches and chapels in our province, without the consent and against the will of the rectors or vicars of such churches or chapels, or of their deputies, and have sacrilegiously applied such trees and herbage to their use, or to the repair of the churches, or to other purposes, whereby peril of souls and grave scandals and disputes between the ministers of the churches and their parishioners daily arise; By the authority of the present Council we declare that the persons guilty of such acts shall incur the greater excommunication which is im-

^a 2 Lee, 373.

^b 16 Edw. III. A.D. 1342. Lynd. 267. Gibs. Cod. 234.

¹ Burn, Eccl. Law, 347.

posed as well by the Constitution of Othobon, formerly Legate in England from the Apostolic See, as by the Council of Oxford, against the violators of Ecclesiastical Privileges; and we command that in future those persons shall, after such unlawful usurpation, be formally, canonically, and publicly declared excommunicated by the rectors or vicars who shall find their churches so injured. And we decree that the aforesaid usurpers shall, to their confusion and shame, be excluded from the communion of the faithful until they shall have effectually afforded amends and made full satisfaction in the premises."

On this Constitution Lyndwood remarks, that it is not lawful for parishioners to cut down the trees in the churchyard for the repair of the fabric of the church without the consent of the rector or vicar; and that neither rector nor vicar should fell them unless they are essential for the repair of his dwelling-house or the chancel: that laymen ought not, under any circumstances, to take such trees of their own authority; but if the nave of the church require repair, the rector or vicar ought not to be hard in granting one or two trees for that purpose.* It will be observed that Lyndwood allows the incumbent to take trees in the churchyard for the repair of his house, which the statute 35 Edw. I. does not. In other respects he agrees with the statute. Of course the law is contained in the statute.

Obligation as
to Fences.

23. The walls, fences, hedges, ditches, and enclosures, with which the glebe is surrounded, must be

* Lynd. 267. 1 Burn, Eccl. Law, 348.

kept in repair, in the same manner as the houses and buildings.^a The parson is only bound to keep up existing fences; he cannot be compelled to erect fences where there were none formerly: but if he do make fences which are necessary and useful, it seems he and his successors must continue them in repair.^b

24. There is no obligation on a parson to use good husbandry in the cultivation of glebe land. Obligation as to Husbandry. In *Bird v. Relph*,^c an action was brought against the executrix of a deceased vicar because the lands of the vicarage were damaged and lessened in value by reason of the same having been used by the deceased vicar in a bad and unhusbandlike manner, and contrary to the custom of the country where they were situate, and having been wrongfully left impoverished and damaged. The Court of Queen's Bench, on the ground of the absence of authority, held that the action could not be sustained; Lord Denman saying—"To render the executors of an incumbent liable for dilapidations, there must be something of demolition." And Patteson, J.,—"That no contract to use lands in a husbandlike manner could be implied between an incumbent and his successor, since there was no privity between them."

25. Ecclesiastics are not permitted to search for or open mines or take minerals, except for the purpose of repairing dilapidations, for the same Right to Mines, &c.

^a Lyndwood, 254. Gibs. Cod. tit. 32, c. 3, p. 790. *Bird v. Relph*, 2 Ad. and El. 773. 4 N. and M. 878. 2 Burn, Eccl. Law, 250.

^b *Bird v. Relph*, 2 Ad. and El. 781, per Littledale, J.

^c 4 B. and Ad. 826. 1 Nev. and Man. 415.

reason as they are restrained from felling timber. Minerals are a more permanent part of the land than timber. Each incumbent is entitled to take the ordinary profits of the land as it was at the time of the endowment, not the land itself, except for the purpose of permanently improving the benefice, as by erecting or repairing necessary buildings. Where the benefice is endowed with open mines, working such mines may be considered as taking the ordinary profits of the lands, and therefore an incumbent may be entitled to take minerals therefrom.

In an early case,^a on a motion for a prohibition to restrain a parson from opening mines, the Court appear to have doubted whether he might not do so, since otherwise mines on glebe lands could never be opened. It may be observed that this is a less inconvenience than that every parson in England should have the power of destroying the surface of his land to search for mines. If any valuable mines are under the lands of ecclesiastics, and it is of public importance that they should be worked, resort may be had to the Legislature.

In the case of the Bishop of London v. Webb,^b an injunction was granted to restrain the defendant, who held under a lease granted by a former bishop, without impeachment of waste, from digging clay; Lord Chancellor Parker saying, "I take this to be within the reason of Lord

^a Lord Rutland v. Greene, 1 Keb. 557. S. C. nom. Lord Rutland v. Gee, 1 Sid. 152. S. C. nom. the Earl of Rutland's case, 1 Lev. 107. Lib. Plac. 246. 1 B and P. 115. T. 15 Car. II.

^b 1 P. Wms. 527. H. 1718.

Barnard's case,^a who was not permitted to destroy the castle, to the prejudice of the remainderman; so neither shall the lessee in the present case destroy this field, against the bishop, who has the reversion in fee, to the ruin of the inheritance of the Church." Knight v. Moseley^b was a bill by the patron against the rector, to stay waste in digging stones on the glebe, other than what was necessary for repairing and improving the rectory. Lord Hardwicke said, "A parson cannot open mines, but may work those already opened:" even a bishop cannot. Talbot, Bishop of Durham, applied to Parliament to enable him to open mines; but his application was rejected. Parsons may fell timber or dig stone for repairs, and they have been indulged in selling such timber or stone where the money has been applied in repairs."

The Ecclesiastical Commissioners propose that the provincial courts should be invested with power to allow mines to be opened upon conditions equitable and fair to the present incumbents and their successors, and upon notice to the patron.^d

26. Although the incumbent is not bound to cultivate the glebe lands, yet if he do so his executor is entitled to emblements. This right is established by the statute 28 Hen. VIII. c. 11, s. 6, which provides, That in case any of the incumbents aforesaid, *i. e.* the incumbent of an archdeaconry, deanery, prebend, parsonage, vicarage, hospital, wardenship, provostship, or other spiritual promotion, dignity, or office (chantries excepted),

Right to Em-
blements.

^a 2 Vern. 738. 1 Salk. 161. ^b Ambler, 176. A. D. 1750.

^c See Co. Lit. 54 b.

^d Report, p. 51.

happen to die, and before his death hath caused any of his glebe lands to be manured and sown at his proper costs and charges with any corn or grain, that then in that case all and every the said incumbents may make and declare their testaments of all the profits of the corn growing on the said glebe land so manured and sown. If the incumbent resign his living, he is not entitled to emblements.^a The case of resignation is not within the words of the statute, nor is it within its principle, since it is the voluntary act of the incumbent.

Precautions
against
Dilapidations;
Restraint upon
Power of
Leasing.

27. The persons liable for and things subject to Ecclesiastical Dilapidations having been treated of, it remains to consider the provisions of the law to prevent dilapidations occurring, or remedy such as have occurred. Amongst preventives may be reckoned the statutes 1 Eliz. c. 19, s. 5, and 13 Eliz. c. 10, s. 3, by which leases or other conveyances by ecclesiastics for a longer period than twenty-one years, or three lives from the making thereof, are rendered void. The 13 Eliz. c. 10, s. 3, expressly recites that "long and unreasonable leases made by colleges, deans and chapters, parsons, vicars, and others having spiritual promotion, be the chiefest causes of the dilapidation and the decay of all spiritual livings and hospitality, and the utter impoverishing of all successors incumbents in the same;" and as this is the object of the statutes, the leases authorized by them cannot be made without impeachment of waste, nor can they be made to one for life, remainder to another for

^a Bulwer v. Bulwer, 2 B. and Ald. 270.

life, because on such a lease the first lessee is not punishable for waste. A lease may be made to one for three lives, because any occupant who takes the estate of the lessee for life is liable for waste.^a

Where a lease is granted by a bishop without impeachment of waste, the clause "without impeachment of waste" is, it seems, nugatory, and does not confer on the tenant any greater right to timber than the bishop himself had.^b

28. Visitation by archdeacons is also used for the ^{Visitation.} purpose of preventing dilapidations. The archdeacon is an assistant of the bishop; he is called *oculus episcopi*, and one of his duties is to see that the property of the Church is kept in proper repair.^c By the 86th canon, 1603, every dean, dean and chapter, archdeacon, who has authority to hold ecclesiastical visitation by composition, law, or prescription, shall survey the churches of his jurisdiction once in every three years in his own person, or cause the same to be done.^d He may visit once a year without cause, and oftener if there be a cause.^e By the Constitution of Othobon,^f bishops and archdeacons are earnestly to admonish clerks that they keep their residences and other buildings in repair. And if the clerk neglect to do the repairs for two months after the monition of the bishop or arch-

^a Dean and Chapter of Worcester's case, 6 Rep. 37. Co. Lit. 44 b.

^b Bp. of Winchester v. Wolgar, 3 Swanston, 493, n. Herring v. Dean and Chapter of St. Paul's, 3 Swanst. 492. See also Bishop of London v. Webb, 1 P. Wms. 527; Bishop of Winchester's case, 2 Freeman, 55.

^c Ayliffe Parergon. 95. ^d 1 Burn, 356. ^e Lynd. 49.

^f A. D. 1268. Oth. Anth. 112. Gibs. Cod. 789. 2 Burn, 148.

deacon, the bishop may cause them to be effectually done at the cost of the clerk, out of the profits of the benefice, causing so much to be received as will be sufficient for the repairs. They are in like manner to cause the chancels of the Church to be repaired by those who are bound thereunto. By the Constitution of Archbishop Reynolds,^a archdeacons and their officials are enjoined that in their visitation of churches they diligently look to the fabric of the church, and especially to the chancel; and if they find any defects, they are to fix a certain time, under a penalty, within which they shall be amended.

The Constitution of Archbishop Stratford^b provides against an abuse by archdeacons: after reciting that archdeacons and other ordinaries, who in their visitations found defects in churches, ornaments thereof, fences of churchyards, and houses of incumbents, commanded them to be repaired under pecuniary penalties, and from those who did not obey, extorted the penalties by censures, and instead of applying them to the repair of the defects as they ought to have done, put the penalties into their own purses, to the injury of the poor people; it therefore ordained, that in order that there should be no occasion of complaint against archdeacons and other ordinaries and their ministers by reason of such penal exactions, and because it became not ecclesiastics to enrich themselves with dishonest and penal acquisitions, such penalties, so often as they should be exacted, should be applied to such

^a A. D. 1322. Lynd. 53. Gibs. Cod. 218. 1 Burn, 355.

^b Lynd. 224. Gibs. Cod. 1008. 1 Burn, 355. A. D. 1343.

repairs under pain of suspension from office, which the archdeacon should *ipso facto* incur, until he should have effectually assigned what was so received to the amendment of the defects.

A visitation is merely an inquest: the visitor may investigate, admonish, and censure; he cannot punish: if it become necessary to enforce his recommendations, a suit must be instituted in the Ecclesiastical Court: an archdeacon has no power to sequester the profits, or to compel the payment of money for the purpose of repairing dilapidations,^a nor can a bishop or archbishop on a visitation suspend a clergyman.^b

29. Another mode of preventing dilapidations is by injunction out of Chancery, which is founded on the common law right of the patron to restrain the incumbent from wasting the property of the living. Prohibition
and Injunction.

There are cases in which writs of prohibition have been awarded against ecclesiastics at the instance of their patrons, which (although this writ is disused, if not abolished) deserve to be noticed, because they prove the common law liability of the incumbent to his patron in respect of dilapidations, and because they are the authorities on which the writ of injunction now in use in such cases is founded.

In 3 Edw. I. a writ of prohibition was issued out of Chancery, directed to the sheriff, commanding him to prevent an abbot from making waste, sale, or destruction of the woods, houses, or men, be-

^a Lynd. 254. God. Rep. App. 14.

^b Dean of York's case, 2 Q. B. 1.

longing to his priory, which was of the King's patronage, and also a *scire facias* to summon the abbot to appear in the King's Bench.^a

In 35 Edw. I. there was a petition to the King in Parliament, that Anthony, Bishop of Durham, had wasted and destroyed all the woods belonging to his bishopric by giving and selling and ill keeping, and by making forges of iron and lead, and burning coals; and it was answered that he should be prohibited by writ out of Chancery to the bishop and his servants, commanding them not to commit the waste mentioned in the petition.^b

Stockman v. Wither^c was an action in which the defendant justified in right of the Bishop of Salisbury. Lord Coke is reported to have said, "If the Bishop of Salisbury shall cut down and sell trees, and not employ them for repairs, if any man will move it, I will grant a prohibition;" and the other Justices agreed. The report in Godbolt is, that if a bishop cut down trees, unless for the repair of his ecclesiastical house, or do or suffer to be done any dilapidations, he may be punished for the same in the Ecclesiastical Court, and a prohibition will not lie in the case. But for such waste done he may be also punished at the common law, if the party will sue there.

^a 2 Rol. Abr. 813. Rot. Claus. Mem. 10.

^b 1 B. and P. 109, n., and ante, p. 46.

^c B. R. M. 12 Jac. I. 1 Rol. Rep. 86. 2 Bulst. 279. Godb. 259, nom. the Bishop of Salisbury's case. There are similar dicta of Lord Coke in Liford's case, 11 Rep. 49 a; 1 Rol. Rep. 100; and Magdalene College case, 11 Rep. 72 b; 1 Rol. Rep. 167.

In *Knowle v. Harvey*,^a a vicar had cut down timber trees growing in the churchyard. The churchwardens moved the Court of King's Bench for a prohibition to the vicar, to stay him from felling any more; and a prohibition was granted by rule of Court. It may be inferred from the report in *Bulstrode*, that a suit was pending at the time the prohibition was moved for.

In the *King v. Zakar*,^b a *quare impedit* had been brought against Zakar, and judgment was given for the Crown; and Zakar by assent of parties was allowed to continue for a time in the vicarage; and whilst in possession, he committed great waste by pulling down glass windows and pulling up planks. The Court was moved that he should have a speedy rule given him to remove, and for an attachment. Coke, C. J.—“We cannot grant this, because his staying in possession after judgment was by assent of the parties, and not by rule of Court. But here you may have a prohibition; and this you may have, not only for the patron, but also for any (for the second incumbent), for this is the King's writ, and any one may have a prohibition for the King.” And by rule of the Court a prohibition was granted to stay the doing of any waste.

A prohibition was granted on motion, and directed to Costerd, the vicar of K., that he should not fell any trees growing in the churchyard, which were for the defence of the church.^c

^a B. R. M. 13 Jac. I. 3 Bulst. 158. 1 Rol. Rep. 335. 2 Rol. Abr. 813.

^b B. R. H. 13 Jac. I. 3 Bulst. 91. 1 Rol. Rep. 335. Moor, 917. 2 Rol. Abr. 813.

^c B. R. T. 17 Jac. I. Costerd's case, 2 Rol. Rep. 111.

Drury brought *quare impedit* against Kent the incumbent and others; and upon a surmise made to the Court that Kent did fell timber on the glebe and on the lands of copyholders, parcel of the rectory, the Court granted a prohibition.^a

In *Acland v. Atwell*,^b a writ of prohibition was, on the motion of the patron, awarded by Lord Keeper Coventry against a prebendary, prohibiting him from committing any waste or spoil upon the houses, lands, woods, or trees of the prebend; and a writ of assistance issued, directed to the sheriff, to see that the defendant did not commit any waste or spoil. Afterwards an attachment issued against the defendant, because he had felled a tree after being served with the prohibition.

In *Lord Rutland v. Greene*,^c the patron moved for a prohibition against a parson on a suggestion that he had dug mines in his glebe: the Court conceived he might dig mines, but that for waste in cutting trees they would grant a prohibition. A rule *nisi* was granted.

In *Jefferson v. Bishop of Durham*,^d application was made to the Court of Common Pleas for a writ of prohibition, to restrain the bishop from felling timber. The Court held that they had no jurisdiction to grant such a writ; and Eyre, C. J., doubted whether the Court of King's Bench had any authority to issue such writ as an original writ,

^a *Drury v. Kent*, Hob. 36.

^b 3 Swanst. 499, n. 2 Rol. Abr. 813.

^c B. R. 15 Car. II. 1 Keb. 557. 1 Lev. 107. 1 Sid. 152. Lib. Plac. 246.

^d 1 B. and P. 105. C. P. M. 38 Geo. III.

or whether there was any common law proceeding against ecclesiastics for dilapidations: he referred to the Year Book, 2 Hen. IV. 3, and explained the writ in 3 Edw. I. as depending on the royal prerogative. Heath, J., held that if the Court had the power, they would not exercise it at the instance of Jefferson, an uninterested stranger.

The case in the Year Book, 2 Hen. IV. 2 & 3, was an action of waste by an archdeacon on a lease for life granted by his predecessor. Thirning said, "The successor of a bishop or archdeacon cannot punish waste done in the time of his predecessor; for if a bishop, archdeacon, or other of the like sort, cut all the trees that he has, our law cannot punish the act; therefore, if his own act is not punishable by law, how can he to whom he has leased be punished for waste done in his time?" Tirwit, "He shall be deposed as a dilapidator of his house." Thirning, "It may be so; but by the law of the land he shall not be punished by the patron, nor in any other way."

The case is thus abridged by Broke:^a "If a bishop, archdeacon, parson, or the like, abate all the woods, he shall be deposed as a dilapidator; per Thirning, "There is no remedy for this at the common law."

Before the statute of Westminster, 2. cap. 14, the commencement of an action of waste was by writ of prohibition, which issued out of Chancery, and was directed to the sheriff. He was thereby commanded that he should not permit the tenant to commit waste, and was authorized to take the posse comitatus, and withstand the doing of any waste.^b If

^a Bro. Abr. Deposition, pl. 1.

^b 2 Inst. 299.

this writ produced no effect, a writ of attachment issued, under which the defendant was attached to appear in the Common Pleas. The statute of Westminster, 2. cap. 14, after reciting "that for waste done to the inheritance of any person, by guardians, tenants in dower, tenants by the curtesy of England, or otherwise, for term of life or years, a writ of prohibition of waste had been used to be granted, by which writs many were deceived, thinking that such as had done the waste should not need to answer but only for waste done after the prohibition to them directed," enacted "that of all manner of waste done to the damage of any person there should, from thenceforth, be no writ of prohibition awarded, but a writ of summons, so that he of whom complaint was, should answer for waste done at any time." Lord Coke, speaking of the writ of prohibition, says, "This remedy may be used at this day." Eyre, C. J., considered that the writ was taken away by the statute, and said, that so far as his researches went, no such writ had issued since, in the common cases of waste by tenants in dower, &c. He seemed to suppose that there were two writs of prohibition, one directed to the party, and one to the sheriff; but this is a mistake.*

There was another writ to prohibit waste, called a writ of estrepement, which was issued to prevent land sued for in a real action being wasted. At common law it might be issued after judgment and before execution; and the statute of Gloucester, cap. 13, gave it *pendente placito*. It was either original, and might issue out of Chancery with

* Bracton, 315. 2 Inst. 299. 2 B. and P. 120.

the original writ, or judicial, and might issue out of the Court in which the action was pending, at any time before execution.*

It may be useful to refer to thus much of the old law of waste, for the purpose of explaining the above cases. The case in 3 Edward I. was before the statute of Westminster the 2nd, and was therefore probably a prohibition at common law. The prohibition against the Bishop of Durham in 35 Edward I. was issued by authority of Parliament. The petition to Parliament implied a doubt as to the course to be pursued, a doubt which perhaps arose in consequence of the statute of Westminster the 2nd. In *Stockman v. Wither*, no prohibition was moved for or granted. What is there reported is merely obiter dicta. In *Knowle v. Harvey*, it would seem that the writ was not a writ of estrepement granted *pendente placito*; since, although it is doubtful whether or not an action was pending, the action, if any, was by the churchwardens against the vicar respecting trees in the churchyard, and could hardly have been a real action. In the *King v. Zakar*, the writ was an estrepement granted before execution in *quare impedit*. The circumstances of *Costerd's* case are not stated. In *Drury v. Kent*, the writ was estrepement granted pending *quare impedit*. In *Acland v. Atwell*, the writ resembled an injunction; all the proceedings were laid in the Court of Chancery. It does not appear that any prohibition was granted in *Lord Rutland v. Greene*.

By 3 & 4 Will. IV. c. 27, s. 36, "No writ of waste, and no other action, real or mixed, (except a

* 2 Inst. 328.

writ of right of dower, or writ of dower unde nihil habet, or a quare impedit, or an ejectment,) and no plaint in the nature of any such writ or action (except a plaint for freebench or dower), shall be brought after the 31st day of December, 1834." If the writ of prohibition against ecclesiastics was allowable by law at the time of this statute, and may be considered as a writ of waste, or an action real or mixed, it is abolished by the statute. But it is submitted, the judicial writ of estrepement may still be issued as an auxiliary process in an action of quare impedit.

Injunction.

In *Bradly v. Strachy*,^a a bill was filed by the patron of a living against the incumbent for an injunction to stay waste in cutting down timber in the churchyard. Lord Hardwicke at first doubted whether a bill could be brought by the patron against the parson, and whether it ought not to have been at the suit of the Attorney-General, but on the authority of the cases as to prohibitions he held that the bill might be sustained. He said, in the cases of bishoprics, where the King is patron, there ought to be the like remedy by prohibition out of Chancery; and he granted the injunction to restrain the cutting of timber except for repairs.

Knight v. Moseley^b was a bill by a patron to stay waste in digging stones, and for an account to which there was a demurrer. The demurrer was overruled, Lord Hardwicke saying, if the demurrer had gone only to the account, it had been good, for the patron cannot have any profit from the living;

^a Barnard, C. R. 399. 2 Atk. 217, nom. *Strachy v. Francis*. Nov. 1741.

^b 1753. Amb. 176.

but it is too general as to staying the digging of stone. He also said, injunction has been granted even against bishops, to restrain them from felling large quantities of timber, on behalf of the Crown, the patron of bishoprics.

In *Hoskins v. Featherston*,^a the bill was by the patroness, the bishop, and the churchwardens, against the widow of the deceased incumbent, to restrain her from cutting timber, grubbing up underwood, ploughing meadow lands, pulling down buildings, or committing or suffering other waste. Lord Thurlow at first refused an injunction, holding that the fee simple was in abeyance, and that the plaintiff had consequently no title to support the injunction. The motion was renewed, and after argument and time taken to consider, he granted the injunction.

In *Withers v. the Dean and Chapter of Winchester*,^b Lord Eldon said, "It was settled by the case of *Jefferson v. the Bishop of Durham*, that as only the patron can prevent a rector or vicar, so a bishop cannot be prevented otherwise than by prohibition or by injunction at the suit of the Crown by its Attorney-General from exercising the right in question (*i. e.* felling timber). The case of *Moseley v. Knight* decides that the patron has the same right against a rector which the Crown or the Metropolitan may exercise in the case of a bishop." His lordship dissolved an injunction obtained against the Dean and Chapter by their lessee, to restrain them from felling timber.

^a 1789. 2 Brown, C. C. 552.

^b 1817. 3 Mer. 427.

In the Duke of St. Alban's v. Skipwith,^a a bill was filed by a patron against a rector to restrain him from converting into tillage ancient pasture. The defendant stated that the grass was intermixed with moss and weeds, and that it would be beneficial to cleanse it, and that he intended to lay it down in due course of husbandry with grass, having regard to modern improvements. It did not appear that the land would be deteriorated, or that the value of the rectory as a residence would be destroyed. Lord Langdale, M. R., held that a parson differed from an ordinary tenant for life, and was entitled to do what he intended to do, and refused an injunction.

However obscure the origin of the liability of clergymen to their patrons for waste, the above authorities sufficiently establish their responsibility, and that the mode of enforcing it is by injunction out of Chancery. In opposition to the opinion of Thirning, C. J., 2 Hen. IV. 3, and the doubts of Eyre, C. J., we have the precedents of 3 Edw. I., the Bishop of Durham's case, the decisions of Lord Coke, Lord Hardwicke, and Lord Thurlow, and the opinion of Lord Eldon.

It is reasonable that the patron whose advowson is a saleable property should have a legal right to prevent the temporalities of the living from being destroyed, and a legal process for enforcing such right.

Remedies;
Suit in Eccle-
siastical Court.

30. The remedies for ecclesiastical dilapidations are suit in the Ecclesiastical Court and action at law. Suits in the Ecclesiastical Court are either by

^a 1845. 8 Beavan, 354.

the bishop *ex officio* in the lifetime of the incumbent, or by his successor after his death or cession.

The ordinary, without any application made by any person, may cause the houses of the Church to be repaired out of the profits of the benefice. He may proceed without any fame of the defects preceding, because it is not done for the deprivation of the parson, but for the amendment of defects.^a The party chargeable with the dilapidations being first cited, an inquisition should be made of the dilapidations and the amount necessary to repair them. This is directed by the following Constitution of Simon Mepham :

By Ordinary *ex officio*.

“ We do ordain that no inquisition to be made concerning the defects of houses or other things belonging to an ecclesiastical benefice shall avail to the prejudice of another, unless it be made by credible persons sworn in form of law, the party interested being first cited thereunto; and the whole sum estimated for the defects of houses or other things belonging to ecclesiastical benefices, “ whether found by inquisition or by way of composition made, the diocesan of the place shall cause it to be applied to the reparation of such defects within a competent time.” ^b

Inquisition.

The inquisition should be made by able and experienced workmen; and clergymen having skill and knowledge in such matters are usually joined with laymen in the mandates for such inquisitions.^c They should swear that they will truly make the inquisition without hatred or favour, or

^a Lynd. 254. ^b A. D. 1328. Lynd. 254. Gibson, 790.
2 Burn, 149.

^c Lynd. 254.

any interest which they have or shall have therein.^a The witnesses should swear that the decays cannot be repaired for less than such a sum; and the party chargeable may produce witnesses to the contrary, and may go on the premises with workmen and survey the dilapidations, and may make exceptions, and disprove the estimate by one or more skilful workmen.^b The estimated amount can only be recovered under the authority of the bishop: the archdeacon has no power to cause the money to be received and applied to the repairs.^c If the time fixed for doing the repairs after receipt of the amount is unreasonably long, the party may appeal.^d

Sequestration. If the incumbent refuse to pay the amount assessed, the revenues of his living may be sequestered. Before a sequestration issues, he should be admonished to do the repairs. The admonition may be by the archdeacon, and should be given at least two months before the sequestration.^e The proportion of the revenue of the benefice to be sequestered is in the discretion of the ordinary. It is usually, and when the incumbent is in no fault, as when the dilapidations have been caused by fire,^f one-fifth. This is founded on the injunctions of Henry VIII., Edward VI., and Queen Elizabeth, by which it is required that proprietors, parsons, vicars, and clerks, having churches, chapels, or mansions, shall yearly bestow on the same mansion or chancels of the churches, being in decay, the fifth

^a Lynd. 254.^b Clark. tit. 125.^c Lynd. 254.^d Id. 254.^e Oth. Anth. 112. God. Rep. App. 14.^f Sollers v. Lawrence, Willes, 420. North v. Barker, 3 Phil. 307.

part of their benefices till they be fully repaired, and the same so repaired shall always keep and maintain in good estate.^a The rule in the Reformatio Legum was that the bishop should cause a seventh part of the emoluments of the living to be set apart until a new house, in all respects fit for the incumbent, was erected, or a ruinous house was thoroughly repaired.^b Archbishop Bancroft, in his circular, left the proportion to the discretion of the ordinary, with this only limitation, "allowing a fit portion for the incumbents to live upon."^c By 1 & 2 Vict. c. 106, s. 92, when the incumbent is not resident, and the bishop has appointed a curate, and assigned to him a stipend equal to the nominal value of the benefice, he cannot allow the incumbent to retain more than one-fourth part for the repair of the chancel, house of residence, premises, and appurtenances.

It is said by Lord Coke,^d and repeated by most ^{Deprivation.} text writers,^e that "Dilapidation of ecclesiastical palaces, houses, and buildings, is a good cause of deprivation." Bishop Gibson^f says, "Though in equity that punishment may well belong to dilapidators, yet that it hath ever been inflicted appears not by any thing that is alleged either out of the books of common or canon law, which speak only of alienations." The cases referred to by Lord Coke are, 29 Edward III. 16; 2 Henry IV. 3; 20 Henry VI. 46 a; and 9 Edward IV. 34 a.

In 29 Edward III. 16, the passage is: Fiff, "We

^a Gibs. Cod. 791. God. Rep. 176. ^b Ref. Leg. Ecc. 39 a.

^c Reg. Bancroft, 168 a. Gibs. Cod. 791. ^d 3 Inst. 204.

^e Degge, 96. Ayliffe, 218. 2 Burn, 152. ^f Codex, 1116.

tell you that the prior who you suppose granted the annuity to you was a dilapidator of his house, and was accused thereof by his monks; whereupon process was issued for the purpose of depriving him, and he was summoned to the Court of Arches, and, seeing that judgment would go against him there, he resigned."

In 2 Henry IV. 3, Tirwit says, "If a bishop, arch-deacon, or other of the like sort, cut all the trees that he has, he shall be deposed as a dilapidator of his house." Thirning: "It may be so."

20 Henry VI. 46 a. Ayscough: "If an abbot alien land belonging to his house, he shall be deposed as a *dilapidator* of his house."

In 9 Edward IV. 34 a, it is said, "If a prior alien lands belonging to his house, he may be deposed."

It appears also, that in the 15th year of King John, (A. D. 1213,) William, abbot of Westminster, was deprived, because he had wasted the revenue of his church or abbey.*

In Warren v. Smith,^b it is said, "If an abbot commit waste, it is cause of deprivation;" and a record H. 38 Edward III. Rot. 14, is referred to, where it is entered on record, that a prior who had more bastards than monks, and gave divers of his possessions to his bastards, and wasted his posses-

* Hollingshed, 181 b, 30, cited in Degge, 96.

^b 1 Rol. Rep. 167. S. C. named Magdalene College case, 11 Rep. 72 a. Other dicta to the same effect may be found in Stockman v. Wither, 1 Rol. Rep. 86; Godb. 259; Liford's case, 11 Rep. 49 a; James Bagg's case, 11 Rep. 98 b; Knowle v. Harvey, 3 Bulst. 158.

sions, for that cause was deprived. These authorities will not warrant a sentence of deprivation except when the waste is very gross and wilful. A clergyman, it would seem, cannot be deprived for permissive waste.

The suit by the successor's incumbent against his predecessor or his representatives is founded on the Constitution of Edmund:^a

Suit by Successor.

"If the rector of a church at his death shall leave the houses of the church ruinous and decayed, so much shall be deducted out of his ecclesiastical goods as shall be sufficient to repair the same and to supply the other defects of the church. The same we do decree concerning those vicars who have all the revenues of the church paying a moderate pension. For inasmuch as they are bound to the premises, such portion may well be deducted, and ought to be reckoned amongst the debts. Always nevertheless having a reasonable regard to the revenues of the church when such deduction shall be made."

The Spiritual Court have jurisdiction over the executors of the deceased incumbent in such case, and the Common Law Courts will not prohibit their proceedings.^b But where the successor had proceeded by action at law, and the defendant had pleaded a tender of £10, which the jury found to be sufficient, and he afterwards commenced a suit in the Ecclesiastical Court, to which the defendant proposed to plead the judgment at law in bar, which plea they refused to receive, the Court of

^a Lynd. 250. Gibson, 789. 2 Burn, 147.

^b F. N. B. 51. F. (118.)

Common Pleas were for granting a prohibition. The case was adjourned.^a

Survey. With reference to a suit in the Ecclesiastical Court by the successor against his predecessor, it is recommended in the books of practice that a bishop, so soon as he is installed, and a rector and vicar, so soon as he is inducted, should procure workmen, such as carpenters, masons, tilers, and others skilled in building, to survey the dilapidations, and write down for what sum they will repair them, and sign the specification as a memorial in case they shall be called as witnesses. There should be two witnesses to every particular; for in the Ecclesiastical Court one bricklayer is not sufficient to prove the defect in the brickwork, nor is one carpenter sufficient to prove what timber is requisite, nor one smith what iron is wanting.^b If the living have been vacant for some years, or if the bishop do not commence his suit for some time after his installation, he is not entitled to recover the whole estimate, but a sum must be deducted from the estimate for the dilapidations which, in the judgment of the workmen, have happened between the time when the living became vacant and the time of the survey.^c

Inquisition. It seems that this preliminary survey does not dispense with the inquisition to be made in the suit after the citation of the defendant under the Constitution of Mepham, which applies to a suit by successor against his predecessor, as well as to a

^a *Okes v. Ange*, 3 Lev. 413.

^b *Clark. tit. 124. 1 Ought. 253. Conset. 363. 2 Burn, 147.*

^c *Conset. 364. Clark. tit. 126. 1 Ought. 254. 2 Burn, 147.*

suit *ex officio*.^a The suit may be by the successor against his immediate predecessor for all the dilapidations, whether they occurred in his time or before it.^b It seems a plea to the successor's suit, that the dilapidations did not happen in the time of the predecessor, and that during his incumbency he expended a fair portion of his revenue in necessary repairs, and that his predecessor had no goods out of which he could obtain compensation for the dilapidations; or that he commenced a suit against his predecessor, and prosecuted it with diligence, but was unable to realize any thing.^c

The Constitution of Edmund is, that the monies necessary to repair the dilapidations shall be deducted out of the deceased incumbent's ecclesiastical goods; that is, out of the property which he hath obtained in right of the Church, and which is tacitly pledged for the repairs. But if the rector has expended his ecclesiastical revenues in improving his own patrimony, or if he has attended too much to his worldly affairs and neglected his ecclesiastical affairs, to the injury of the Church, his private property is liable for dilapidations.^d In the administration of a deceased rector's effects, his debts are preferred to money due for dilapidations, and money due for dilapidations to legacies.^e

Thus, where an incumbent had taken the benefit of the Insolvent Debtors' Act, and died, the Judge of the Consistory Court ordered a balance due on a sequestrator's account to be paid to the assignee, for division amongst the creditors, in preference to

^a Lynd. 254. F. N. B. 51. F. (118.)

^b Conset. 363.

^c Conset. 363. ^d Lynd. 250. ^e Degge, 94. Ayliffe, 217.

Order in which
Money due for
Dilapidations
is to be paid
out of De-
ceased's Estate.

the claims of the new rector for dilapidations, and of a builder who had repaired the rectory by the directions of the bishop.^a

Bishop Gibson justly complains that private debts should be satisfied out of the spoils of the Church, and the Church herself be denied the common right of restitution. "For," says he, "whatever substance any incumbent gets from the Church is the greater in proportion to his neglect of repairs, and that part that grows from such neglect is no better than a theft from the Church, whose rights and privileges were anciently the first care of the law."^b

If the Ecclesiastical Court proceed against an executor in respect of goods not liable for dilapidations, a prohibition will be awarded by the Common Law Courts, as where in a suit against the executor of the administrator of an incumbent they proceeded against the goods of the administrator, on the ground that he might have wasted the goods of the intestate.^c

Fraudulent
Conveyance.

By 13 Eliz. c. 10, if any archbishop, bishop, dean, archdeacon, provost, treasurer, chaunter, chancellor, prebendary, or any other having any dignity or office in any cathedral or collegiate church, or parson, vicar, or other incumbent of any ecclesiastical benefice whereunto do belong any house or houses or other buildings which by law or custom he is bound to keep and maintain in reparation, do make any deed or deeds of gift or alienation of his moveable goods and chattels, to the intent and pur-

^a Little Halingbury, Essex, 1 Curt. 557.

^b Codex, 791.

^c Carter v. Pecke, 3 Keb. 619.

pose, after his death, to defeat and defraud his successor of such just action and remedy as otherwise he might and should have had for dilapidations against his executors or administrators, by the laws ecclesiastical the successor of him that shall make such deed or deeds of gift or alienation shall and may commence suit, and have such remedy in any Court Ecclesiastical competent for the matter against him or them to whom such deed or deeds of gift or alienation shall be so made, for the amendment and reparation of so much of the said dilapidations and decays, or just recompense for the same, as hath happened by his act or default, in such sort as he might, should, or ought lawfully to have, if he or they to whom such deed or deeds of gift or alienation shall be so made were executor or executors of the testament and last will of him that made such deed or deeds of gift or alienation, or were administrators of his goods or chattels.

A sequestration can only issue against Church property; therefore the tithes of a lay rector cannot be sequestered for the dilapidations of the chancel.^a When the suit is against any person but the incumbent of the living, the mode of enforcing obedience to the decree of the Court is by writ de contumace capiendo, by which the party may be imprisoned.

Suit against
Lay Rector.

The Ecclesiastical Commissioners recommend that the lay rector, when bound to repair the chancel, should be subject to sequestration. They also say that doubts have been entertained whether suits in the Ecclesiastical Court can be maintained

^a Walwyn v. Awberry, 1 Mod. 258; 2 Mod. 254.

against perpetual curates, or in respect of the dilapidations of lands allotted under inclosure acts.^a

Against Dignitary.

From the last clause of the Constitution of Othobon, "also we do enjoin, *by the attestation of the divine judgment*, archbishops, bishops, and other inferior prelates, that they keep in repair their houses and other edifices by causing such reparations to be made as they know to be needful,"^b which, according to the gloss, means a sentence of eternal damnation at the last day of account, when the sheep shall be separated from the goats,^c —it may be supposed that the dignitaries of the Church are not at law responsible for dilapidations, and that their obligation to repair is merely sanctioned by religion and conscience.

There are, nevertheless, cases and dicta which prove that proceedings may be taken against archbishops and other prelates for dilapidations. In 15 John, the Abbot of Westminster was deprived for waste.^d In 14 Hen. III. the Archbishop of Dublin was fined 300 marks for disafforesting the forests of his archbishopric.^e In 3 Edw. I. a prohibition was issued against a prior to restrain him from committing waste.^f In 35 Edw. I., Parliament, as has been seen, directed that a prohibition should issue against the Bishop of Durham for a like cause.^g In the Year Book, 29 Edw. III. 16, a case is mentioned of a prior against whom proceedings were taken for dilapidations, with a view to deprive him, and who

^a Rep. of Eccles. Com. 51.

^b Oth. Anth. 112.

^c Oth. Anth. 119. Ayliffe, 217.

^d Degge, 96.

^e Liford's case, 11 Rep. 49 b.

^f 2 Rol. Abr. 813.

^g 1 B. & P. 109, π.

resigned in consequence. In 38 Edw. III. a prior was deprived for wasting and aliening his possessions.^a In 1374, Archbishop Reynolds issued a commission to inquire into dilapidations left by Walter, late Bishop of Coventry and Lichfield, and which the commission says he ought to have repaired.^b Bancroft, Bishop of London, is said to have sued for dilapidations and recovered in the Arches' Court, against the son of Bishop Aylmer, the sum of £4210.^c Aylmer was not the immediate predecessor of Bancroft in the see; he died in 1594, and was succeeded by Fletcher, who held the see from Dec. 1594 to June 1596, when Bancroft succeeded him. This case, therefore, proves that in the Ecclesiastical Courts the suit need not be against the representative of the immediate predecessor, but may be sustained against the party who did or suffered the dilapidations complained of. In 1687, Wood, Bishop of Lichfield and Coventry, was suspended by Sancroft, Archbishop of Canterbury, for dilapidations, the revenues of his benefice sequestered, and the episcopal palace rebuilt thereout.^d

31. By the custom of England, which is the *Action at Law*.

^a 1 Rol. Rep. 167.

^b Gibs. Cod. Appendix, s. 7.

^c Nelson's Rights of the Clergy.

^d 12 Mod. 237. In addition to the above authorities, the following cases contain dicta that proceedings may be taken against a bishop, abbot, prior, college, archdeacon, or dean and chapter, for dilapidations: 9 Edw. IV. 34 a. 29 Edw. III. 16. 2 Hen. IV. 3. 20 Hen. VI. 46. *Stockman v. Wither*, 1 Rol. Rep. 86. Godb. 259. 2 Bulst. 279. *Stamp v. Clinton*, or *Liford's case*, 1 Rol. Rep. 100. *Magdalene College case*, 11 Rep. 72 b. *James Bagg's case*, 11 Rep. 98 b. *Knowle v. Harvey*, 1 Rol. Rep. 335. 3 Bulst. 158.

common law, all prebendaries, rectors, and vicars of the realm of England, for the time being, ought to repair and sustain all the houses and buildings of their prebends, rectories, and vicarages, and ought to transmit them to their successors so repaired and sustained; and if any prebendary, rector, or vicar shall not transmit and leave such houses and buildings repaired and sustained to his successor, but shall suffer them to become out of repair and dilapidated, his executors or administrators after his death shall, out of his goods and chattels, pay to his successor a sum of money sufficient to satisfy him for the necessary repairing and building of such houses and buildings. Upon this custom, says Sir Simon Degge, actions on the case have frequently been brought, both anciently during the times of popery and of later times, and damages recovered.^a Bishop Gibson says that Sir Simon Degge was the first writer who advanced the notion of the action on the case in the Temporal Courts for dilapidations.^b And in *Jones v. Hill*,^c which was an action on the case for dilapidations by a vicar against his predecessor, who had avoided the vicarage by accepting another benefice, it was moved in arrest of judgment that the action would not lie, because the matter was purely of spiritual cognizance. The rolls were searched for the precedents cited by Degge, and it was found that in none of them had judgment been given, but in each of them there was a verdict and divers continuances entered. But in *M. 3 Jac. II. C. B.*, between *Day v. Hollington*, a similar case,

^a Degge, 97.

^b Codex, 791.

^c 3 Lev. 268. Carth. 224. P. 2 W. and M.

judgment had been given for the plaintiff on demurrer. Pollexfen, C. J., who had tried the cause, was of opinion that the action did not lie, and the Court were inclined to agree with him, and the case was adjourned for further argument. In Trinity term it was argued again before Powell and Rookeby, Justices, Pollexfen and Ventris being dead, and judgment was given for the plaintiff. The case of *Okes v. Ange*,^a before referred to, was, so far as it went, a confirmation of this judgment. In *Lutwych* there are the declarations in two cases in which judgment was given for the plaintiff.^b In another case, the plaintiff declared for dilapidations, that the defendant had resigned the rectory, and that the plaintiff had been lawfully presented thereto; and it was objected to the declaration that the resignation was not well alleged, because it was merely stated that he resigned generally, and not said into the hands of the bishop, as it ought to have been, and therefore it did not appear that the plaintiff was legal successor. The Court were of opinion that the declaration was ill for the above cause, and the plaintiff never had judgment, but compromised the matter for a trifle.^c In *Radcliffe v. D'Oyley*,^d an action for dilapidations by a prebendary against his predecessor, it was contended that an action could not be maintained because there was no instance in

^a C. B. H. 6 W. III. 3 Lev. 413.

^b *Salkard v. Beckwith*, H. 15 Jac. Lutw. 116. *Kingford v. Lloyd*, H. 7 W. III. Lutw. 117. The precedent in *Salkard v. Beckwith* states the custom as extending to masters of free chapels and chaplains of chantries.

^c M. 12 W. III. *Reynolds v. Hewitt*, Lutw. 115.

^d 2 D. and E. 630. (A. D. 1788.)

which an action had been brought for the dilapidation of prebendal property ; but the Court, without hesitation or doubt, decided that there was no difference between prebendaries and other ecclesiastical persons, and that, as they were within the very words of the custom stated in the precedents, the action was maintainable. In *Downes v. Craig*,* the plaintiff and the defendant had exchanged livings, and the plaintiff sued the defendant for dilapidations ; it was contended that the action could not be sustained by a successor by exchange, because it was reasonable to infer that each party agreed to take the living of the other as it was. The Court held that as there was no express agreement, none could be implied, and that the law on which the action for dilapidations was founded applied to successors of every description. Lord Abinger said, "It might be a very considerable question whether if a contract for the exchange of livings were made in writing with an express declaration that neither party should sue the other for dilapidations : if one party said, If you will admit me to your living, I will admit you to mine, and I will make no claim for dilapidations ;—it would not amount to a simoniacal contract, and so would be void." A doubt in which Parke and Rolfe, B. B., concurred, but upon which Gurney, B., expressed no opinion.

This action, when brought against the representatives of a deceased incumbent, is an apparent, but not a real exception to the rule "*Actio personalis moritur cum personâ*." It is in form an action on the case for tort, and the pleadings allege no contract

* 9 M. and W. 166. (A. D. 1841.)

by the deceased. It is however founded on the notion that the deceased has misappropriated the revenues of the benefice by applying to his private purposes monies which he ought to have expended in repairing the Church property; or it may perhaps be considered as arising out of a contract made between the incumbent in his corporate character and himself as an individual, the rights derived from which survive to his successor, and the liabilities to his executors.^a

The cause of action for dilapidations is divisible, and the incumbent is not bound to include his whole claim in one action, but may sue in one action for the dilapidation of the rectory house, and in another for that of the chancel. If the Court see that the motive for bringing several actions is to oppress the defendant, they will interfere, and visit the plaintiff with costs.^b

It will be observed that the custom above stated does not warrant an action for dilapidations by the successor of a bishop against his predecessor or his representatives; it would seem, therefore, that no such action can be sustained. The case in the Year Book, 2 Hen. IV. 3, and Broke's Abridgment^c thereof, already referred to, are authorities against such an action. The reason may be the higher estate a bishop has in the temporalities of his see, and the greater confidence the law reposes in him. By 1 & 2 Vict. c. 18, which enabled archbishops

^a See *Sollers v. Lawrence*, Willes, 421, per Willes, C. J. 1 Wms. Saund. 216 b, n. a.

^b *Young v. Munby*, 4 Maule and Sel. 183.

^c Tit. Deposition, pl. 1, ante, p. 67.

and bishops to raise money by mortgage for the purpose of rebuilding or improving their palaces, and enacted that they should insure the buildings on which the works were done, rendered them liable to an action for neglecting to insure, in the event of the buildings being injured by fire; and the archbishop or bishop not re-instating them within twelve months, the action to be brought, in the case of an archbishop, by the other archbishop; in the case of a bishop, by the archbishop of his province.^a This statute was repealed, except as to existing mortgages, by 5 & 6 Vict. c. 26, s. 3.

The reason that there are distinct remedies against an incumbent or his representatives for dilapidations by suit in the Ecclesiastical Courts, and by action in the Common Law Courts, is the twofold nature of the incumbent's obligation to repair: his obligation to the Church, as a member thereof; and his obligation to his patron and successor, as a common law tenant of land. The one obligation is enforced by suit in the Ecclesiastical Court; and whether such suit is by the bishop *ex officio*, or at the instance of his successor, it is equally a proceeding by his ecclesiastical superior to compel him to perform his obligation to the Church. The common law obligation is sanctioned by injunction and action. The estate of the incumbent in the lands of which the benefice is endowed is a common law right; it follows that the conditions annexed to the estate are cognizable by the common law, and that if those conditions are violated, there should be common law remedy for the persons interested in

^a 1 & 2 Vict. c. 18.

their observance. It appears, therefore, that the proceedings by injunction and action are not arbitrary innovations, but are founded on and necessarily result from the principles of law.

32. Money recovered for dilapidations by sentence, composition, or otherwise, must within two years be expended in the reparation of the buildings in respect whereof such money shall be paid, on pain that the person receiving and not employing such money shall forfeit double as much as he shall receive, and not employ, to the use of the Queen.^a

Statutory Provisions relating to Dilapidations.

By 17 Geo. III. c. 53 (the Gilbert Act), by which incumbents are authorized to raise money to build a residence, or to rebuild or repair a mean or ruinous house, it is provided that all money recovered or received by suit or composition from the representatives of any former incumbent, and not laid out in the repair of such buildings, shall be applied in part payment of the estimate for the works under the Act; and if not received until after the monies have been raised under the Act, shall be applied towards payment of the principal borrowed; and if the principal has been discharged, shall be paid into the hands of a nominee appointed by the ordinary, patron, and incumbent, to be laid out in making additional buildings and improvements on the glebe, to be approved by the ordinary, patron, and incumbent; and in the mean time, or in case such buildings shall not be necessary, to be invested in Government or other good securities, and the interest to be paid to the incumbent for the time being.^b

The 1 & 2 Vict. c. 106, which empowers the

^a 14 Eliz. c. 11, s. 18.

^b 17 Geo. III. c. 53, s. 9.

bishop in certain cases to raise money for the purpose of building or repairing a house of residence, contains a similar provision as to the application of monies received for dilapidations, except that the nominee into whose hands the money is to be paid is to be appointed by the bishop.^a

The statute of 1 & 2 Vict. c. 106, also contains the following provisions for compelling the repairs of residence houses by non-resident incumbents, by which they are liable to the penalties for non-residence if they suffer their houses to become dilapidated.

When a spiritual person not residing on his benefice does not during the period of non-residence keep his house of residence in good and sufficient repair, the bishop may cause a survey to be made by some competent person, the costs of which, if the house is found out of repair, are to be borne by the incumbent. Upon the surveyor's report the bishop may issue his monition to the incumbent to put the house in repair according to the report; a copy of the survey and report being annexed to the monition. And if he do not within one month after service show cause to the contrary, to the satisfaction of the bishop, or within ten months put the house in repair, to the satisfaction of the bishop, he is liable to the penalties of non-residence imposed by the statute during all the time the house remains out of repair, and until it is put in repair.^b

In cases of rectories having vicarages or perpetual curacies endowed, it is made a condition to the residence of the vicar or curate in the rectory house

^a 1 & 2 Vict. c. 106, s. 69.

^b S. 41.

being a legal residence, that he shall keep the house belonging to the vicarage or perpetual curacy in proper repair, to the satisfaction of the bishop.^a

When an incumbent has a licence for non-residence because the house of residence is unfit, or has licence to reside in a mansion or messuage of his own, it is a condition of his licence that he keep the house of residence and buildings belonging thereto in good and sufficient repair and condition, to the satisfaction of the bishop.^b

^a 1 & 2 Vict. c. 106, s. 35.

^b S. 43.

CHAPTER II.

DILAPIDATIONS BY TENANTS FOR LIFE AND YEARS.

1. Parties liable; Tenants for Life; for Years.—2. Guardian in Soccage.—3. Tenant by Elegit.—4. Tenant at Will.—5. Division of Waste, and Extent of Liability under the Statutes.—6. Voluntary Waste in Houses.—7. Fixtures.—8. Alterations.—9. Improvements.—10. Permissive Waste in Houses; in External Coverings.—11. In Internal Coverings.—12. In Drains, and not Cleansing.—13. With reference to the Condition of the House at the time of the Lease.—14. Waste by Fire.—15. Waste by a Stranger.—16. Inevitable Accidents.—17. Covenant to repair House; Alterations.—18. Wear and Tear.—19. Painting.—20. Materials.—21. Accidents.—22. Covenant to improve.—23. Covenant to insure.—24. Extent of Covenant to things.—25. To Persons.—26. Duration of Covenant.—27. Form of Covenant.—28. Waste in Gardens.—29. Waste in Lands; Alteration.—30. Fences.—31. Obligation to cultivate Lands.—32. Obligation as to Live Stock.—33. Right to Emblements; of what things.—34. By what Tenants.—35. When Right accrues.—36. Incidental Rights.—37. Right to Manure; Away-going Crop, &c.—38. Waste as to Timber.—39. Decayed Timber.—40. Right to cut for Repairs.—41. Covenants as to Trees.—42. When excepted from Lease.—43. Remedies for Dilapidations by Action.—44. By Forfeiture of Lease.—45. Relief in Equity.—46. Injunction and Account.—47. Entry to view Waste.—48. Right of Lessor to repair.—49. Remedies against Lessor.

Parties liable
for Waste;
Tenant by the
curtesy, &c.

1. By the common law, only tenant in dower, tenant by the curtesy, and guardian, were punishable for waste, because their estates being created by

the law, the law annexed to them the condition that they should neither do nor permit waste; but a tenant for life or for years, whose estate was created by act of the party, was not liable for waste, (that is, for permissive waste,) unless the grantor so stipulated; the parties being at liberty to contract as to the manner in which the tenements should be used: the law did not imply a condition against waste in cases where they did not so provide.^a This was remedied by the statute of Marlbridge,^b which provides "that farmers during their terms shall not make waste or exile of houses, woods, or men, or of any thing belonging to the tenements that they have to farm, without special licence had by writing of covenant, making mention that they may do it, which thing if they do and thereof be convict, they shall yield full damage, and be punished by amer-
 ciamment grievously." The statute of Gloucester^c Of Gloucester. further enacts, "that a man from henceforth shall have a writ of waste in the Chancery against him that holdeth by law of England or otherwise for term of life or for term of years, or a woman in dower; and he who shall be attainted of waste shall lose the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at."

These statutes extend to every description of Tenant for Life and Years. tenant for life or years, whether created by grant

^a Doctor and Student, Dial. 2, cap. 2. 2 Inst. 145, 299. 2 Black. Com. 282. See contra, Reeve's Hist. Eng. Law, vol. i. 386; vol. ii. 73.

^b 52 Hen. III. c. 23, s. 2.

^c 6 Edw. I. c. 5.

or devise,^a to a tenant per auter vie, to a party to whom lands are granted for an uncertain period as quamdiu sola fuerit, or quamdiu se bene gesserit, or quousque promotus fuerit,^b to a tenant from year to year,^c for a year, or half a year.^d Although a tenant in tail after possibility of issue extinct is not punishable for waste, yet if he grant over his estate, his assignee is but tenant for life, and liable therefore.^e Every person in whom the estate for life or years becomes vested as assignee,^f executor,^g or occupant of an estate per auter vie,^h takes it subject to the condition against waste. The king is not within the statutes of Marlbridge or Glocester; and therefore if an estate for life or years be forfeited for treason or felony, waste will not lie against the king;ⁱ but if he grant the estate, his grantee is liable for waste.^j

Guardian in
Soccage.

2. A guardian in soccage is liable for waste, voluntary or permissive, but not for waste done by a stranger, though it was doubtful whether the remedy against him was by action of waste or of account.^k

Tenant by
Elegit.

3. Tenants by elegit, statute merchant, or statute staple, were not within the statutes of Marlbridge or Glocester, because they were not tenants for life or years, and therefore writs of waste could not have

^a 2 Rol. Abr. 826, pl. 7.

^b 2 Inst. 301.

^c 48 Ed. III. 25. Bro. Abr. Waste, pl. 52.

^d Lit. s. 67. 2 Inst. 302.

^e 2 Inst. 302.

^f Co. Lit. 54 a. Sanders v. Norwood, Cro. El. 683.

^g 2 Inst. 302.

^h Co. Lit. 54 a. 2 Inst. 301.

ⁱ Com. Dig. Waste, C. 3.

^j 2 Rol. Abr. 826, pl. 4.

^k 2 Inst. 305. Stat. Marlbridge, 52 Hen. III. c. 17. 2 Inst. 135. F. N. B. 359. Co. Lit. 54 a.

been maintained against them.^a It does not follow that they are irresponsible for waste. If they commit waste, they are liable to an action on the case, or to account for the value in reduction of the debt;^b and it seems reasonable that they should also be responsible for permissive waste, that they should be bound to take ordinary care of the premises so long as they hold them as a pledge for their debt. Fitzherbert says that there is a writ of waste in the register against tenant by elegit,^c and both Broke and Rolle consider that such tenant is bound to account for waste. They make no distinction between waste voluntary and permissive. It may be observed that a tenant by elegit is within the principle of the common law rule, as he derives possession by act of law, and not by the act of the party; and though his right is conferred by statute, a rule of the common law is sufficiently expansive to include his case. From *Godfrey v. Watson*,^d which was a suit for an account between a judgment debtor and a creditor who had extended land under an elegit, in which case Lord Hardwicke is reported to have said, "A mortgagee in possession is not obliged to lay out money any further than to keep the estate in necessary repair," it may perhaps be inferred that his Lordship intended to assimilate the case of a tenant by elegit to that of a mortgagee. In a recent case,^e *Knight Bruce, V. C.*, has decided

^a *Dean and Chapter of Worcester's case*, 6 Rep. 37 a. Co. Lit. 54 a. 2 Inst. 302. *Broke, Abr. Waste*, pl. 78. 2 Rol. Abr. 826, pl. 5 & 6.

^b 21 Edw. III. 26.

^c *F. N. B.* 58, H. (134.)

^d 3 Atk. 517.

^e *Bull v. Faulkner*, 12 Jur. 33, Dec. 3, 1847.

that tenants by elegit, under 1 & 2 Vict. c. 110, coming for relief to the Court of Chancery, are bound to account as mortgagees in possession. It follows that, in such case, they are responsible if the premises have depreciated for want of proper repairs.

Tenant at Will. 4. Tenants at will (that is, those who hold merely at the will of the lessor, and whose estate may be determined at any time, not those who hold under yearly tenancies determinable by notice, and who are sometimes improperly termed tenants at will,) are not included in the statute of Marlbridge or Gloucester, and are not bound to do any repairs; but still they cannot lawfully commit voluntary waste. "If a house be leased to hold at will," says Littleton, s. 71, "the lessee is not bound to sustain or repair the house, as tenant for years is tied; but if tenant at will commit voluntary waste, as in pulling down of houses or in felling of trees, it is said that the lessor shall have an action of trespass for this against the lessee; as if I lend to one my sheep to tathe his land, or mine oxen to plough his land, and he killeth my cattle, I may still have an action of trespass, notwithstanding the lending." A house having been destroyed by reason of a tenant at will negligently keeping his fire, it was held that he was not liable to an action.* Gawdy, J., said, he takes not any charge upon him but to occupy and pay his rent; and none will affirm that if a lessee at will suffer his house to fall down, an

* Countess of Shrewsbury's case, 5 Rep. 13. S. C. Countess of Salop v. Crompton, Cro. El. 777, 784.

action will lie against him, for he is not bound to repair it.^a

The estate of tenant at will is so infirm, that it is reasonable that he should not be bound to do any repairs, since, if he expend money upon the tenements, his lessor may immediately determine his interest, and prevent him from deriving any advantage from such outlay; and if the tenements are falling into decay, it is always in the power of the lessor to enter and take measures for their preservation.^b

5. Waste is of two sorts, voluntary and permissive. According to the old cases, every tenant for life or years within the statute of Gloucester is liable for waste in the same degree; but in modern times doubts have been entertained, though it would seem without any sufficient foundation, whether a tenant from year to year, or a tenant for years, not under covenant, is liable for permissive waste. No distinction can in reason be made between a tenant for life and a tenant for a year, or for part of a year. Each is a farmer within the statute of Marlbridge and a tenant within the statute of Gloucester, and each is made liable by the same words; and there is no provision that one shall be liable for one sort of waste, and one for another. The books which say simply that a tenant for a year, or for part of a year, is a tenant within the statutes, are authorities

Liability of
Tenants for
permissive
Waste.

^a Cro. El. 784. *Panton v. Isham*, 3 Lev. 359. 1 Salk. 19. *Harnett v. Maitland*, 16 M. and W. 257. 4 D. and L. 545.

^b See *Gibson v. Wells*, 2 Smith, 677, where a similar observation is made by Mansfield, C. J., as to tenant from year to year.

that he is liable for permissive waste; because, as appears by *Littleton*, and *Countess of Shrewsbury's* case, all tenants are, at common law, liable for voluntary waste; and if a tenant within the statutes is not thereby made liable for permissive waste, they introduce no new liability, which it has always been considered they have done.

This doubt having arisen, the cases on the subject require a detailed examination.

In an action of waste by an abbot against a lessee of his predecessor, amongst other things, for permitting a house to fall, the Court said, "To permit a house to be ruinous is waste, but not if it was ruinous at the time of the demise: in such case the termor is not bound to repair it, notwithstanding it falls in his time."^a

A lease for years was made with a condition for re-entry if the lessee did any waste. He suffered the house to fall for want of covering and repairs; and it was moved, whether the lessor might re-enter for this matter of negligent and permissive waste. *Welsh* and *Dyer* thought, *primâ facie*, that he might; for this waste was punishable by the statute of *Glocester*, and the words "any waste" were general and indifferent to either of the two kinds of waste voluntary or negligent.^b

In three cases, actions of waste were held maintainable against lessees who had permitted chambers and houses to be in decay, for defects of plastering and want of daubing, whereby the prin-

^a 10 Hen. VII. 2. Bro. Abr. Waste, pl. 143.

^b *Dyer*, 281 b. pl. 21. M. 10 & 11 Eliz.

cial timbers were decayed, and the chambers became very dilapidated and foul.*

Jermey v. Lowgar^b was an action on the case by a party seized for life in right of his wife against a tenant for years, who had burned his house. It was moved that the action did not lie, because it was the plaintiff's folly to make a lease, and not provide, by covenant or otherwise, that the lessee should not commit waste, which is the reason that the lessor had not any action at common law to punish waste. But Fenner and Clench held the contrary, by reason of the charge wherewith he is chargeable over. Although the report does not state that the action was for negligent waste, yet the nature of the waste and the objection favour the supposition that such was the case.

In *Cudlip v. Rundle*^c the plaintiff declared that he was tenant of a house for a term of years, and demised to the defendant for seven years, and that the house was destroyed in consequence of the defendant having negligently and improperly kept his fire. It appeared that the house in question was excepted out of the demise for seven years, and that the defendant held it as tenant at will. According to some of the reports of this case, the Court considered that the defendant would have

* *Weymouth and wife v. Gilbert and wife*, 8 Car. B. R. 2 Rol. Abr. 816, pl. 36. *Newell v. Downing*, 9 Car. B. R. *Sir John Corbet v. Sir James Stonehouse and Elizabeth his wife*, T. 9 Car. B. R. 2 Rol. Abr. 816, pl. 37. *Lady Stonehouse* was tenant for life under a settlement. Cro. Car. 400. *Sir W. Jones*, 354.

^b Cro. El. 461. P. 38 Eliz.

^c 4 Mod. 9. 12 Mod. 14. Holt, 410. 1 Show. 310. Carth. 202. Comb. 177. 3 Salk. 156. T. 2 W. and M.

been liable as tenant at will, by reason of the damage to the plaintiff, he being answerable for the waste to his lessor, had the plaintiff declared against him as tenant at will: according to others, that he was not liable, because merely tenant at will.

In *Hicks v. Downling*,^a an action on the case was brought against the defendant, who was tenant for three years, for negligently keeping his fire, whereby the house demised was burned. The only objection made was, that it did not appear that the plaintiff had a reversion. The objection was overruled, and the plaintiff recovered.

In *Panton v. Isham*,^b the plaintiff had demised to the defendant a stable for a week, and so on from week to week for so long time as both parties pleased. The stable, demised to the defendant, and others were destroyed by reason of the defendant's negligence in keeping his fire. It was held that for the stable demised to the defendant the plaintiff should not recover, because the demise was for three weeks only; and afterwards the defendant was tenant at will, against whom no action would lie for negligent waste.

In an action against a tenant from year to year, for suffering a house to be out of repair, the plaintiff had an estimate made of the sum necessary to put it into complete and tenantable repair. Lord Kenyon said, "It is not to be permitted for the plaintiff to go for the damages so claimed. A tenant from year to year is bound to commit no waste, *and to make fair and tenantable repairs*, such as putting in win-

^a 1 Salk. 13. 2 Salk. 734. 3 Ld. Ray, 354. 12 Mod. 100. M. 8 W. III.

^b 3 Lev. 359. 1 Salk. 19. P. 13 W. III.

dows or doors that have been broken by him, so as to prevent waste and decay of the premises; but in the present case the plaintiff has claimed a sum for putting a new roof on an old worn-out house. This, I think, the tenant was not bound to do, and that the plaintiff has no title to recover."^a This case is an authority that a yearly tenant is liable for permissive waste.

Gibson v. Wells^b was an action on the case for permissive waste against (the report says) a tenant at will (probably a tenant from year to year). Mansfield, C. J., nonsuited the plaintiff, because he had never known an action on the case being maintained for permissive waste only. On a motion for a new trial, he said, "There is no doubt but an action on the case may be maintained for wilful waste; but at common law, if any part of the premises are suffered to be dilapidated, it amounts to permissive waste; and if this action be maintainable, such an action might be brought against a tenant at will who omitted to repair a broken window. I think *this action* is an innovation, and am not disposed to encourage it." The liability of a yearly tenant for permissive waste is not denied. The objection was to the form of action; the Court considering that an action on the case was not the proper remedy for a mere omission.

Herne v. Benbow^c was also an action on the case for permissive waste. The defendant was tenant for years, under a lease containing a covenant to repair.

^a *Ferguson v. —*. 2 Esp. 590. M. 1797.

^b 1 New. Rep. 290. 2 Smith, 677. T. 1805.

^c 4 Taunt. 764. E. 1813.

Upon a motion by the plaintiff for a new inquiry, the defendant having suffered judgment by default, the Court said, "Whatever duties the law casts on the tenant, the law will raise an assumpsit from him to perform. The facts alleged are permissive waste. *An action on the case does not lie against a tenant for permissive waste.* Countess of Shrewsbury's case, 5 Rep. 13." In this case the objection was to the form of action, not to the liability of the tenant.

The Countess of Shrewsbury's case does not support the position for which it was cited by the Court. It was there held, that an action on the case for permissive waste did not lie against a tenant at will, because "against tenant for life or years, or other particular tenant who comes in by act of the party, an action lies not for waste at the common law. *But by the statute, an action is given against tenant for life or years,* but tenant at will remains as at the common law."

Horsfall v. Mather^b was an action of assumpsit against a tenant from year to year: the plaintiff alleged in his declaration that the defendant had agreed to deliver up the premises in the same state as he received them. Gibbs, C. J., nonsuited the plaintiff, saying, "The obligation is stated too largely: can it be contended that a yearly tenant would be bound to rebuild if the premises were destroyed by accidental fire, or if they became ruinous by any other accident? *He is only to use them in a husband-like manner.* I am sure it has always been holden

^a Cro. El. 777.

^b Holt, N. P. C. 7. T. 1815.

that a tenant from year to year is not liable to general repairs." This case decides no more than that a tenant from year to year is not liable in the same degree as a tenant who covenants to repair. It is apparently admitted that he is bound to do some repairs.

Jones v. Hill^a was an action on the case for permissive waste. The defendant held under a lease containing a covenant to repair and to yield up the premises in as good plight as they should be in when finished under the direction of Middleton. Dallas, J., directed a nonsuit, on the objection that the case could not be maintained for permissive waste. A rule to set aside the nonsuit was refused; and Gibbs, C. J., said, "I do not say whether permissive waste may or may not lie, but it is impossible that it should be waste to put the premises into such repair as A. B. had put them."

Auworth v. Johnson^b was an action of *assumpsit* against a tenant from year to year who had made no express agreement to repair: the promise laid was, that the defendant would perform all necessary and needful repairs, and keep and continue the same so repaired in good and tenantable order and condition. It appeared that the stairs were worn out, new sashes were wanted, that the doors were rotten and falling to pieces from decay, that the sash-lines, latches, catches, keys and locks, were broken and damaged, and that a panel of one of the doors was broken. Lord Tenterden, C. J., in summing up said, "It appears this was a very dilapidated house

^a 7 Taunt. 392. 1 Moore, 100. E. 1817.

^b 5 C. and P. 239. E. 1832.

when the defendants took it, and they have had a very considerable quantity of work done upon it. The first question is, What are the things an occupier of a house from year to year is bound to do? I am of opinion that he is only bound to *keep the premises wind and water tight*. A tenant who covenants to repair is to sustain and uphold the premises, but that is not the case with a tenant from year to year. A great part of what is claimed by the plaintiff consists of new materials where the old were actually worn out; for that the defendants are clearly not liable. But if you think that the defendants have done *all that tenants from year to year ought to do*, considering the state of the premises when they took them, they are entitled to your verdict." The jury found for the defendants.

In *Torriano v. Young*,^a which was an action of assumpsit for not repairing against a yearly tenant, who, it was contended, held under the terms of an expired lease, Taunton, J., said, "If Mr. Young was tenant from year to year, he would not be liable, as this is merely permissive waste. A tenant from year to year is not liable for mere wear and tear of the premises."

In *Leach v. Thomas*,^b which was an action of assumpsit against a yearly tenant for voluntary waste, Patteson, J., said, "As the defendant was tenant from year to year, he was not bound to do substantial repairs; he was only bound to keep the premises wind and water tight."

^a 6 C. and P. 8. T. 1833.

^b 7 C. and P. 327, Pembrokehire Summer Assizes, 1835.

Beale v. Sanders^a was an action of assumpsit for permissive waste. The defendant had held the premises under a void lease containing a covenant to repair. It was contended that he was merely tenant from year to year, and, as such, was not liable for permissive waste. The Court decided that he held under the terms contained in the lease; and Tindal, C. J., remarked that—"That circumstance got rid of the difficulty whether a tenant from year to year was liable for permissive waste."

In *Martin v. Gilham*,^b the defendant was tenant from year to year, and the waste permissive. The declaration charged that the defendant cut down trees and used the premises in an untenantlike manner. One objection made for the defendant was that he was not liable for permissive waste. The Court gave no opinion on the point, but held that the declaration charged voluntary waste, and therefore the plaintiff could not recover for permissive waste.

This question was again raised in *Harnett v. Maitland*.^c The defendant's counsel there argued not only that a tenant from year to year was not liable for permissive waste, but that the statutes of Marlbridge and Gloucester did not extend to permissive waste. Parke, B.,—"Then you say that the liability for permissive waste is confined to tenants by the curtesy and tenants in dower, because there is nothing that makes a tenant for life liable for permissive waste but the statute of Gloucester: your argument is against the authorities in 2 Inst. 145,

^a 3 Bing. N. C. 850. 5 Scott, 58. T. 1837.

^b 7 A. and E. 540. 2 N. and P. 568. M. 1837.

^c 16 M. and W. 257. 4 D. and L. 545. H. 1847.

and 2 Rol. Abr. 828." The Court held that the declaration was insufficient, because it did not show that the defendant was more than tenant at will, and forbore to give an opinion as to the liability of tenant from year to year for permissive waste.

Before *Gibson v. Wells*, it does not appear to have been doubted but that every description of tenant for life and years was liable for both sorts of waste, permissive and voluntary.* In *Panton v. Isham*, it would seem to have been the opinion of the Court that if the destruction by fire, which was permissive waste, had taken place within the three weeks during which the defendant held the premises for a certain term, he would have been liable as a farmer within the statute of Marlbridge, or a tenant for years within the statute of Gloucester. *Gibson v. Wells*, *Herne v. Benbow*, and *Jones v. Hill*, are all decisions on the form of action, and are founded on the notion that the action on the case was not the proper remedy for a mere nonfeasance. In neither of those cases is the liability of a yearly tenant for permissive waste denied. Nor is it denied that an action of waste or of assumpsit on an implied promise to repair could be maintained against such tenant for permissive waste. *Ferguson v. ———*, *Horsfall v. Mather*, *Auworth v. Johnson*, the dictum of Pattenon, J., in *Leach v. Thomas*, are authorities that a tenant from year to year is liable to do some repairs during his tenancy, as well as for

* 11 Hen. VI. 1 B.; *Broke, Abr. Waste*, pl. 12, 130; *Co. Lit.* 53 a; 2 *Inst.* 145; 2 *Rol. Abr.* 815, 818; *Com. Dig. Waste*, D. 2; 1 *Wms. Saund.* 323 d, n., are other authorities for this position.

voluntary waste ; or, in other words, that he is liable for permissive waste. The only case in which it is distinctly stated that such tenant is not liable for permissive waste is *Torriano v. Young*. The statement is a dictum merely of Taunton, J., at *Nisi Prius*, and probably proceeded from an erroneous recollection of the cases of *Gibson v. Wells*, *Herne v. Benbow*, and *Jones v. Hill*. The cases of *Beale v. Sanders*, *Martin v. Gilham*, and *Harnett v. Maitland*, leave the question where it was. They may perhaps be considered as authorities for a doubt; not as raising a doubt, but as recognizing one previously raised.

6. The statute of Marlbridge prohibits waste or ^{Waste in Houses and Buildings.} exile of houses, woods, or men, or any thing belonging to the tenements had to farm. These words are large enough to include every thing that is part of the tenements demised. The books enumerate buildings, gardens, lands, and woods, as the subjects of waste. It is proposed to state the law applicable to each of these subjects separately, and under each head to collect the cases relating,—1st, to voluntary waste ; 2ndly, to permissive waste ; and 3rdly, to express contracts concerning waste, such as covenants to repair.

And first, of waste in houses and buildings. It ^{First, voluntary.} has been expressly decided that the law of waste extends not only to dwelling-houses, but to every description of building, such as outhouses and barns. The word houses in the statute includes every description of building :^a but an incomplete building, such as a pale, a post, or an uncovered wall (which probably means erections not forming part of a

^a *Doe d. Grubb v. Earl of Burlington*, 5 B. and Ad. 507.

building or a fence), are not subject to the law of waste.^a

Voluntary waste is a wilful act committed by the tenant or by his orders, by which the tenements are destroyed, injured, or altered: it is voluntary waste in a house to prostrate it,^b or to destroy or remove any part of it, as a post, a door, a window, a furnace, a bench, or wainscot fixed to the house.^c The rule against voluntary waste extends to additions made to the house by the tenant himself: thus it has been decided that "glass annexed to the windows by nails or in any other manner by the lessor or the lessee cannot be removed by the lessee, for without glass it is no perfect house. Peradventure great part of the costs of the house consists of glass, which if it be open to tempests and rain, waste and putrefaction of the timber would follow. Wainscot also is parcel of the house, and it makes no difference whether fixed by great nails or little nails, or by screws or irons put through posts or walls (as have been invented of late time); for if wainscot is by any of the said ways, or by any other, fastened to the posts or walls of the house, the lessee cannot remove it."^d

Things merely placed by the tenant on the premises, but not fixed, however bulky such things may be, are not within the rule as to voluntary waste: thus a barn placed upon pattens and blocks of

^a 44 Edw. III. 44. 40 Ass. 22. Bro. Abr. Waste, pl. 107. 22 Hen. VI. 24. Bro. Abr. Waste, pl. 94. Earl of Bedford v. Smith, Dyer, 108. Co. Lit. 53 a.

^b Co. Lit. 53 a.

^c 2 Rol. Abr. 819.

^d Herlakenden's case, 4 Rep. 63 b. Corbet v. Stonehouse, 2 Rol. Abr. 819, pl. 8. T. 9 Car.

timber lying upon the ground, but not fixed in or to the ground, may be removed;^a so if it rest upon blocks of stone which are fixed in the ground, but not fastened to the blocks by mortar or otherwise.^b A mill removable at pleasure, which was an octagonal wooden building, raised on a casement of brickwork and anchored to the ground by shores and land-ties, part of the shores and the whole of the land-ties being one foot under the surface of the earth, was found by the jury not to be a fixture.^c So distillers' vats supported upon brickwork, but not fastened to the ground, are goods and chattels, and no part of the premises on which they are placed.^d And where certain caps and steps of timber were fixed by a tenant to a building, and he placed in these caps and steps, jibs which he fastened there by pins above and below, the jibs might be taken out of the caps or steps without injuring either them or the building; the jibs were held to be the personal property of the tenant, and no part of the building, so that he did not lose his right to them by leaving them there after the expiration of his term.^e

7. The right to remove fixtures is an exception to the rule against voluntary waste. By this ex-

Exception to
the rule against
voluntary
Waste.

^a *Culling v. Tuffnell*, cor. Treby, C. J., at Hereford, 1694. B. N. P. 34: per Ellenborough. 3 East, 55. *Earl of Bedford v. Smith, Dyer*, 108.

^b *Wansborough v. Maton*, 4 A. and E. 884. 6 N. and M. 367. *Rex v. Loudonthorpe*, 6 D. and E. 377. *Rex v. Ottley*, 1 B. and Ad. 161.

^c *Steward v. Lombe*, 1 B. and B. 506. 4 Moor, 281.

^d *Horn v. Baker*, 9 East, 215.

^e *Davis v. Jones*, 2 B. and Ald. 165. See also *Wood v. Hewitt*, 3 Q. B. 913, and *Mant v. Collins*, there cited.

Fixtures. ception a tenant for life or years, who during his tenancy has fixed certain chattels to the premises for the purposes of his trade, or as matters of ornament or furniture, and which can be removed without injury to the premises, is entitled to remove them, and is not guilty of waste in so doing. Although the cases of tenant for life and of tenant for years are separately treated of in the books on this subject, there is no authority for saying that they are not equally entitled to fixtures. And, as they are made liable for waste without distinction by the statutes of Marlbridge and Gloucester, it may be inferred that the exception extends in the same degree to both.

Early Cases. The earlier cases in favour of this exception proceed rather upon the ground, that by the removal of the fixtures the house was not injured, than of the purpose for which the annexation was made; and they are authorities for the position, that to entitle a tenant to remove a fixture it must be annexed in such a manner that the house will be left in the same state after its removal as it was before it was fixed.

One of the earliest authorities in favour of the right to remove trade fixtures is in the Year Book, 20 Hen. VII. 13. It is said, "If a lessee for years fix a furnace to the freehold for his advantage, or a dyer fix vats or vessels to occupy his occupation, during the term he may remove them. But if he suffer them to remain fixed after the end of the term, they belong to the lessor. So of a baker." And in another Year Book, "For a furnace fixed to the earth and not to the walls, a table dormant set

on to posts and such like, fixed by the termor, and taken away by him within his term, waste does not lie, because the house is not impaired." Broke adds,—The same seems of a paling, tables dormant,—*qy.* of a tank?*

In an action of waste for taking away two doors and the check-posts, the defendant pleaded that he had erected them during the term: *per Perrin*: "Some doors are a defence to the freehold, as outer doors; others are less necessary, as inner doors. If a lessee erects posts of outer doors, and hangs the doors on hinges, he cannot remove them during the term; but it is otherwise of inner doors."^b

In *Day v. Austin*,^c a difference is taken between a furnace fixed to the middle of the house and one fixed to the wall; for the termor may take it from the middle of the house, but not from the wall; for the wall is worse for taking it away, and therefore it is waste.

In *Bridgman's case*,^d it was held by *Dodderidge, J.*, that wainscot could as well be removed by a lessee as arras hangings could.

According to more recent authorities, a fixture to Trade
Fixtures. be removed must have been annexed either for the purpose of trade, or of ornament or furniture, *i. e.* domestic convenience.

In *Poole's case*,^e a soap-boiler, for the convenience of his trade, had put up vats, coppers, tables,

* 21 Hen. VII. 26. Bro. Abr. Waste, pl. 104; Chattels, pl. 7.

^b Cooke's case, Moor, 177. M. 24 Eliz.

^c Owen, 70. S. C. named *Day v. Bisbitch*, Cro. El. 374, 37 Eliz.

^d 1 Rol. Rep. 216. T. 13 Jac.

^e 1 Salk. 368. M. 2 Anne.

partitions, and paved the back yard. Holt, C. J., held that the soap-boiler might well remove the vats he set up in relation to his trade, and that he might do it by the common law (and not by virtue of any special custom) in favour of trade and to encourage industry. But there was a difference between what the soap-boiler did to carry on his trade and what he did to complete the house, as hearths and chimney-pieces, which were not removable.

In a case before Lord Chief Baron Comyns, at the assizes at Worcester, a cyder-mill, which was let very deep into the ground and fixed to the freehold, was ruled to be personal estate, and to belong to the executor of a tenant in fee, and not to the heir.^a Although this case was treated by the House of Lords as no authority for the position that the executor of a tenant in fee is entitled to trade fixtures, to the prejudice of the heir,^b it may be considered as an authority for the right of a tenant for life or years to remove a similar fixture. It was relied on by Lord Hardwicke in *Lawton v. Lawton*, and has been cited with approbation in many subsequent cases^c where the rights of tenants for life and years as to fixtures have been in question.

In *Lawton v. Lawton*,^d the question was, whether a fire engine, set up for the benefit of a colliery, by a tenant for life, should be considered as personal estate, and go to the executor, or as part of the freehold, and go to the remainderman. It was worth

^a Cited by Mr. Wilbraham in *Lawton v. Lawton*, 3 Atk. 13.

^b *Fisher v. Dixon*, 12 Cl. and Fin. 212.

^c Amb. 114. 3 Esp. 11. 4 Esp. 34.

^d 3 Atk. 13. (1743.)

£350: it was customary to remove such things, and in building sheds for securing the engine, holes were left for the ends of the timber, to make it more commodious to remove; and it was very capable of being carried from one place to another. Lord Hardwicke, adverting to the fact that it was a personal moveable chattel, taken either in part or in gross before it was put up, and saying that coppers, and all sorts of brewing vessels, with pipes laid through the walls and supported by walls, being laid for the convenience of trade, could not be retained by landlords,^a and that the case was a mixed one between enjoying the profits of land and carrying on a species of trade, and therefore came very near the instances of brew-houses, furnaces and coppers, decreed for the executor.

Lord Dudley v. Lord Warde^b is a similar decision, as to a fire engine set up by a tenant in tail. It was there objected that it could not be removed, because a house had been built to which the engine had been annexed, and the executor could not pull down the house; but Lord Hardwicke said, the distinction was where the house was the principal, and where only the accessory. In that case, the engine was the principal, and therefore resembled the case of coppers, which could not be taken away without spoiling the walls; yet as they were the principal, and the building was only the better to enable the use of them, they might be removed.

In Lawton v. Salmon,^c certain salt pans, made of

^a See Exp. Quincey, 1 Atk. 477, probably the case referred to.

^b Ambler, 113. (1751.)

^c 2 H. Bl. 259, n. E. 22 Geo. III.

hammered iron and riveted together, had been fixed by a tenant in fee to some salt-works. They were brought in pieces, and might be removed in pieces; were not joined to the walls, but were fixed with mortar to a brick floor, and might be removed without injuring the buildings. It was held that the executor was not entitled to them. Lord Mansfield, in delivering judgment, said, "It would have been a different question if the springs had been let, and the tenant had been at the expense of erecting these salt-works. He might well have said, 'I leave the estate no worse than I found it.' That would be for the encouragement and convenience of trade and the benefit of the estate."

In *Fitzherbert v. Shaw*,^a Gould, J., at Nisi Prius, thought that a tenant was entitled to remove a wooden stable which stood on blocks and rollers, a shed built on brickwork, and some posts and rails erected by himself.

In *Dean v. Allaley*,^b Lord Kenyon, at Nisi Prius, held that a tenant was entitled to carry away two sheds erected by himself, because they were necessary and useful erections for the benefit of his trade, and which enabled him to carry it on with more advantage.

In *Penton v. Robart*,^c the tenant had erected a building for the purpose of making varnish. It consisted of a brick basement sunk into the ground, with a superstructure of wood. A wooden plate was laid into the bricks, and the quarters mortised

^a 2 H. Bl. 258. T. 29 Geo. III.

^b 3 Esp. 11. E. 39 Geo. III.

^c 4 Esp. 33. 2 East, 88. M. 42 Geo. III.

into it. It was 12 feet high in front, and 7 in breadth. There was a large brick chimney, with iron plates round it, and stanchions. It was held that he was entitled to remove it, Lord Kenyon saying, "In modern times the leaning has always been in favour of the tenant, in support of the interests of trade."

Elwes v. Mawe,* which is the leading case on this subject, limits the exception as to the right to remove fixtures, by deciding that a tenant has no right to remove *buildings* erected by him for the ordinary purposes of husbandry, and not connected with any description of trade. The tenant of a farm had erected a beast-house, a carpenter's shop, a fuel-house, a cart-house, a pump-house, and a fold-yard. The buildings were of brick and mortar, and tiled, and the foundations about a foot and a half deep in the ground; the carpenter's shop was closed in; the other buildings were open in the front, and supported by brick pillars; the fold-yard wall was of brick and mortar, and the foundation was in the ground. The tenant had, during the term, removed the buildings, leaving the premises in the same state as when he entered upon them. He was held liable in an action on the case for waste. Lord Ellenborough delivered the judgment of the Court; and after commenting on all the cases, and disapproving of the dictum of Gould, J., in *Fitzherbert v. Shaw*, and the decision of Lord Kenyon in *Dean v. Allaley*, on the ground that buildings in those cases were not erected for the purpose of trade, and explaining *Penton v. Robart* as the case of a

Agricultural
Buildings.

* 3 East, 38. M. 43 Geo. III. 2, Smith's Leading Cases, 99.

building erected for the purpose of trade, "upon which ground," he said, "it might be properly supported;" and expressing his doubts of the dictum of Lord Kenyon in that case, by which he extended the exception to erections of green-houses and hot-houses by nurserymen, he said, "The case of buildings for trade has always been put and recognized as a known allowed exception from the general rule which obtains as to other buildings; and the circumstance of its being so treated and considered establishes the existence of the general rule to which it is considered as an exception."

In *Thresher v. the East London Water Company*^a; it was made a question whether lime-kilns built of brick and mortar, with foundations let into the ground, for the purpose of carrying on the trade of a lime-burner, were removeable by a tenant for years, and the Court expressed themselves as considering the general question to be one of great importance, which would require much deliberation in any future discussion.^b

Domestic
Fixtures.

The following cases establish the right to remove fixtures set up for ornament or convenience.

In *Squier v. Mayer*^c it was held that a furnace, though fixed to the freehold, and purchased with the house and hangings nailed to the walls, should go to the executor, and not to the heir, contrary to *Herlakenden's* case, which the Lord Keeper said was not law as to such things. It may be observed that *Herlakenden's* case mentions glass and wainscot,

^a 2 B. and C. 608. 4 D. and R. 62. H. 1824.

^b *Amos and Ferard on Fixtures*, 43.

^c 2 Freem. 249. 2 Eq. Cases, Abr. 430. T. 1701.

the external and internal finishings of a house, and not a furnace and hangings. The Lord Keeper probably meant that the rule laid down in *Herlakenden's* case did not apply to the things then in dispute, and did not intend to overrule that case.

In *Beck v. Rebow*,^a the Lord Chancellor decided that pier glasses, hangings, and chimney-glasses, which were fixed with nails and screws to the walls of a house, there being no wainscot under them, were not included in a covenant to grant all things fixed to the freehold. He said, "they were only matter of ornament and furniture, and removeable by the lessee of a house."

In *trover*, by the executor against the heir, *Lee, C. J.*, held that hangings, tapestry, and iron backs to chimneys, belonged to the executor.^b

In *ex parte Quincey*,^c Lord Hardwicke said, "During the term, a tenant may take away chimney-pieces, and even wainscot; which is a very strong case."—"Several sorts of things are often fixed to the freehold, and yet may be taken away, as beds fastened to the ceiling with ropes, nay, frequently nailed, and yet no doubt but they may be removed."

In *Lawton v. Lawton*^d he says, "Removing wainscot fixed only by screws, and marble chimney-pieces,^e is now allowed to be done."

In *Lee v. Risdon*,^f Gibbs, C. J., speaks of wainscot

^a 1 P. Wms. 94. H. 1706.

^b *Harvey v. Harvey*, 2 Str. 1141. M. 14 Geo. II.

^c 1 Atk. 477. Augt. 1750. ^d 3 Atk. 15. Decr. 1743.

^e See also *Lord Dudley v. Lord Warde*, Amb. 113. Per *Ld. Mansfield*, *Lawton v. Salmon*, 1 H. Bl. 260. Per *Ld. Ellenborough*, *Elwes v. Mawe*, 3 East, 53.

^f 7 Taunt. 191. M. 57 Geo. III.

screwed to the wall, trees in a nursery ground, and certain grates, as removeable.

In the *King v. the Inhabitants of St. Dunstan*,^a Bayley, J., said that stoves and grates which were fixed with brickwork in chimney places, and might be removed without doing any injury to the chimney places, and cupboards which stood on the ground, and were supported by holdfasts, and were capable of removal without doing any other injury to the walls than leaving a few marks of nails, might be removed by a tenant during the term.

In *Grymes v. Boweren*,^b the question was as to the right of a tenant to remove a pump which was attached to a perpendicular plank; the plank rested on the ground at one end, and was fastened to the wall of the house by an iron pin; the tube of the pump passed through a brick flooring into a well, which the tenant had arched over. In removing the pump, most of the floor bricks were displaced, but the pin was left in the wall. The Court gave judgment in favour of the tenant, on the ground that the article in dispute was one of domestic convenience, that it was erected by the tenant, and could be removed entire.

Avery v. Cheslyn^c was an action on the case for removing a cornice, the defendant pleading that he had fixed the cornice with screws only for the purpose of ornament, that he carefully removed it, and repaired all damage. Coleridge, J., left it to the jury to say whether the cornice was merely a matter

^a 4 B. and C. 687. See also *Colegrave v. Dias Santos*, 2 B. and C. 77.

^b 6 Bing. 437. H. 1830.

^c 3 A. and E. 75. 5 N. and M. 370. E. 1835.

of ornament fixed during the tenancy, capable of removal without doing substantial injury to the freehold, and so removed, in fact, during the tenancy. The jury found for the plaintiff, and the Court held the direction right. The right to remove did not depend upon the removal, in fact, being without injury; but it was material to inquire into that circumstance, to ascertain the manner in which it was fixed. Besides, the plaintiff was entitled to damages if the defendant, in the exercise of his right of removal, in any way injured the house.

In *Leach v. Thomas*,^a a landlord complained against his tenant for removing a chimney-piece and some small pillars of bricks and mortar which he had built on a dairy floor to hold pans. Pattenon, J., said, "With respect to the chimney-piece, the only question is, whether it was an ornamental chimney-piece or not? It has been laid down by Lord C. J. Dallas^b that a tenant may remove ornamental chimney-pieces. With regard to the brick pillars, I think they had become part of the freehold, and could not be legally removed: it is not necessary for that purpose that they should have been let into the ground."^c

In *Buckland v. Butterfield*,^d the tenant had purchased and brought from a distance a conservatory, which he erected on a brick foundation 15 inches deep: on that was bedded a sill, over which was

^a 7 C. and P. 327. Sum. Ass. 1835.

^b In *Buckland v. Butterfield*, 2 B. and B. 58. 4 Moore, 440.

^c See also *Lyde v. Russell*, 1 B. and Ad. 394, as to Bells; *Lane v. Dixon*, 4 C. B. 776, as to a Door-plate.

^d 2 B. and B. 54. 4 Moore, 440. E. 1820.

frame-work covered with slate; the frame-work was 8 or 9 feet high at the end, and about 2 feet in front. The conservatory was attached to the dwelling-house by eight cantalivers let 9 inches into the wall: the cantalivers supported the rafters of the conservatory. Resting on the cantalivers was a balcony with iron rails. The conservatory was constructed with sliding glasses, paved with Portland stone, and connected with the parlour chimney by a flue. Two windows opened from the house into the conservatory; a door opened into the balcony: so that when the conservatory was pulled down, the side of the house to which it had been attached became exposed to the weather. The Court held that the tenant was guilty of waste in removing the conservatory. Dallas, C. J., in delivering the judgment of the Court, said, "On the one hand, it is clear that many things of an ornamental nature may be in a degree affixed, and yet, during the term, may be moved; and, on the other hand, it is equally clear that there may be that sort of fixing or annexation, which, though the building or thing annexed may have been merely of ornament, will yet make the removal of it waste."—"We are of opinion," he proceeds, "that no case has extended the right to remove nearly so far as it would be extended if such right were to be established in the present instance."

The observations which arise on the foregoing cases are: 1st, That in order to entitle the tenant to remove a fixture, it must be fixed to the building or land demised in such a way that upon its removal the building or land shall be left in the same or in

a better state than it was before the annexation of the fixture. 2ndly, That there is distinction between chattels which are substantially of the same character before they are fixed, when fixed, and after removal, such as engines, pumps, and grates, which are engines, pumps, and grates, whether chattels or fixtures; and things the character of which is altered by their annexation to the land, such as buildings which, when fixed, exist as buildings, and before and after severance exist merely as materials, bricks and mortar. Things of the first class may be removed, whether fixed for the purpose of trade or of ornament, or domestic convenience. Buildings, it seems, may be removed if erected for the purpose of trade. Such appears to be the result of the cases of *Lord Dudley v. Lord Warde*, and *Penton v. Robart*; and the Court, in *Elwes v. Mawe*, expressly distinguish between *buildings* erected for the purpose of trade and *buildings* erected for the purpose of agriculture: the whole argument of the judgment is to show that agricultural buildings are not within the same rule as trade buildings. Things coming within the building class which are annexed for the purpose of ornament or convenience, it may be concluded, cannot be removed, such as an out-house. There is no case warranting the removal of such things: *Elwes v. Mawe*, and *Buckland v. Butterfield*, are strong authorities against extending the exception; and *Leach v. Thomas* is the decision of one of the most learned of the present Judges, that even a slight erection of bricks and mortar, for the purpose of domestic convenience, cannot be taken down.

3rdly, That the right of nurserymen to remove green-houses and hot-houses as trade buildings is left in doubt, it being affirmed by Lord Kenyon, and doubted, if not denied, by Lord Ellenborough. On the one hand, it may be said, that their case resembles those relating to mining fixtures. It is at least a mixed case between occupying land and carrying on a trade. If any distinction can be made, it is in favour of the gardener, green-houses and hot-houses being erected for rearing of exotics, which are raised by the gardener's skill, and have not necessarily any connection with the land demised. On the other hand, it must be borne in mind that the mining cases were not cases of simple buildings, but of machinery and of buildings merely necessary to the machinery, and that green-houses and hot-houses have a peculiar adaption to the nursery ground demised; and it may be presumed were intended to form part of the freehold, unless otherwise agreed. 4thly, That the decision of *Elwes v. Mawe* merely extends to agricultural buildings, not to utensils, implements, or machinery fixed for agricultural purposes. It is difficult, if not impossible, to distinguish the case of a machine fixed by a farmer for some purpose connected with agriculture,—a threshing machine, for instance,—from that of a steam engine fixed for working a mine, or from the cyder-mill case. Thrashing corn is as much a species of trade as mining or manufacturing cyder. 5thly, Domestic fixtures by which a house is ornamented or furnished must be distinguished from additions made to the house, either externally or internally, by which it is finished; and upon this distinction may

perhaps be reconciled the cases referred to at the end of *Herlakenden's* case, with the other cases relating to domestic fixtures. The case of glass windows is clear. As to wainscot, the authorities are apparently conflicting. Lord Hardwicke in one place says that wainscot is a strong case, and his observation is repeated by Dallas, C. J.; in another he speaks of wainscot fixed with screws. The wainscot allowed to be removed was probably an ornamental wainscot which had been fastened to the finished walls of a room, and not the ordinary wainscot, to take away which would leave the room unfinished.

The reason upon which the exception in favour of fixtures is founded is the presumed intention of the parties. From the nature of the fixture, the manner in and the purpose for which it is fixed, it is inferred that the tenant intends to retain his property in the thing, notwithstanding its annexation to the house, and that the landlord has authorized him to annex and disannex it. Such being the reason for the exception, any thing may be a removeable fixture by agreement of the parties;* and a thing which by the general law would be a removeable fixture may, by agreement, become part of the freehold. Custom, or agreements which have usually been made between parties in particular places, and with reference to which, therefore, parties are understood to agree, unless they otherwise express, may make those things fixtures which by the general law would not be so, and the contrary.

* See *Wood v. Hewitt*, 8 Q. B. 913. *Lane v. Dixon*, 4 C. B. 776. The cases on covenants to repair relating to fixtures are collected in another part of this chapter.

In consequence of the exception as to fixtures, they have become a peculiar description of property, and there are many rules of law relating to them as such, which are not within the scope of this treatise. It should be noted, however, that the tenant must remove them during his term, and that if he omit to do so, they become the property of the landlord.^a

Alterations. 8. An alteration of the buildings demised is wilful waste if it be injurious to the inheritance, either by diminishing the value of the estate, increasing the burden upon it, or impairing the evidence of title. Thus, converting two chambers into one, or e converso, or a hand-mill into a horse-mill, or a corn-mill to a fulling-mill, have been held to be waste.^b Pulling down a house, although it be ruinous and ready to fall, and rebuilding a smaller one, is said to be waste, because it cannot be intended that the small house is equally profitable as the large one; but if the house had fallen of itself, without the lessee's default, it is not waste to rebuild on a smaller scale,^c the lessee not being bound to rebuild at all. It might be waste to rebuild it larger, because it might increase the charge of the lessor to repair it.^d It is said not to be waste to enlarge a room, whereby the house is made more profitable to the lessor, but that it will not be in-

^a Lyde v. Russell, 1 B. and Ad. 394; and see Penton v. Robert, 2 East, 88, and Amos and Ferard on Fixtures.

^b 10 Hen. VII. 2. Bro. Abr. Waste, pl. 143. Graves' case, Co. Lit. 53 a, n. 3. H. 4 Jac. City of London v. Græme, Cro. Jac. 182. T. 5 Jac.

^c 22 Hen. VI. 18 B. Bro. Abr. Waste, pl. 93.

^d 2 Rol. Abr. 815, pl. 18.

tended that the enlargement renders the room more profitable.^a This must be understood with the further qualification, that the evidence of title is not affected by the act.

There are conflicting authorities as to whether it is waste to build a new house where none was before. The conflict is as to the application of the rule of law, not as to the rule itself. It is not waste simply to alter, but it is waste to alter to the injury of the inheritance. Some think that to build a new house is necessarily a benefit to the lessor, others that it is not. The latter seems to be the better and prevailing opinion. A new house may increase the burdens of the lessor by the charge of its repair; and the act of building a house may be used as evidence that the builder is the absolute owner of the land.^b Green took from Cole a lease of a brew-house at £120 a year: he pulled down the brew-house and built new houses, by which the annual value of the premises was raised to £200. The case was twice tried in the City of London Courts before different Recorders. On the first trial, the jury found for the plaintiff; on the second, for the defendant. The judgment was, upon writ of error to the House of Lords, reversed on a point of form. Forth, an alderman of London, who claimed under Green, applied for the relief to the Court of Chan-

^a Keilwey, 36 B. 13 Hen. VII.

^b Keilwey, 38 B. 13 Hen. VII.; Cecil and Cave's case, 2 Rol. Abr. 815, pl. 22; 1 Rol. Abr. 507, pl. 7, P. 38 Eliz.; Lord Darcy v. Askwith, Hob. 234, H. 15 Jac., are authorities that to build a new house is not waste. Co. Lit. 53 a; Anon. 11, Mod. 7, are to the contrary.

cery, because the waste was an amelioration of the premises. Lord Keeper Bridgman directed an issue as to whether it was waste or not, which was tried at bar before Lord Chief Justice Hale; and it was resolved to be waste, notwithstanding the amelioration, by reason of the alteration of the thing and the evidence; and the jury gave their verdict accordingly.^a In *Young v. Spencer*,^b which was an action on the case for waste by landlord against tenant, the defendant had broken a door through the wall of the house which he held of the plaintiff: the jury, under the direction of Bayley, J., found a verdict for the plaintiff, with nominal damages, on the ground that the defendant had no right to make the door; but also found that the house was not weakened or injured in any respect. The Court directed a new trial, in order that it might be determined by a jury whether the alteration affected the evidence of the plaintiff's title. In an ejectment brought by the lord of a manor against a copyholder, because the copyholder had committed waste in pulling down a barn, and thereby forfeited the copyhold, the jury found that the defendant had pulled down the barn and did not intend to rebuild it, and that the property was not damaged in consequence. The Court gave judgment for the defendant on the ground that the act was not waste, because it was not injurious to the lord's reversion,

^a *Cole v. Green*, 1 Lev. 309. S. C. named *Cole v. Forth*, 1 Mod. 94. S. C. named *Green v. Cole*, 2 Saund. 228. H. 22, and 23 Car. II.

^b 10 B. and C. 153. M. 1829. See *Alston v. Scales*, 9 Bing. 3.

either by diminishing the value of the estate, or by increasing the burden upon it, or by impairing the evidence of title.^a The evidence of title may be affected by an alteration in two ways: 1st, by the tenements being rendered different from those described in the title deeds; and 2ndly, by the act of alteration being used as evidence that the party doing it has a greater estate than he really has.

Although a landlord may complain of a new erection as voluntary waste, he may waive this right, and insist upon the tenant keeping it in repair.^b But if the lessor, without the consent of the lessee, build a cottage on the premises during the lease, the lessee is not liable for waste, either voluntary or permissive, to such cottage.^c

9. If a tenant for life or years choose to alter or Improvements. improve tenements by erecting buildings, or rebuilding, or doing extensive repairs to those already erected, whereby their value is increased, he has no claim at law or in equity against the remainderman or landlord for the value of the improvements. Thus where trustees had advanced trust funds to a tenant for life of the funds, and a house, for the purpose of enlarging and improving the house, and altering and improving the lands, it was held a breach of trust.^d Sir John Leach, V. C., refused an inquiry as to the expense which a tenant for life had

^a Doe d. Grubb v. Earl of Burlington, 5 B. and Ad. 507. 2 N. and M. 534. M. 1833.

^b 22 Edw. III. 21 B. Co. Lit. 53 a. 12 Hen. IV. 4, 5. 9 Hen. VI. 52. Bro. Waste, pl. 11.

^c 49 Edw. III. 1. 2 Rol. Abr. 818, pl. 19. Lord Darcy v. Askwith, Hob. 234. ^d Bostock v. Blakeney, 2 Brown, C. C. 653.

incurred in repairing damages done to the mansion-house by dry-rot, though he allowed him the costs of finishing it, it having been left unfinished by the testator.^a Lord Eldon refused to order a reference as to whether it would not be beneficial to all parties interested that a new roof should be put on the mansion-house, held by a tenant for life, at the expense of the testator's estate.^b Where a tenant for life had expended a considerable sum in building upon the premises, which buildings constituted a substantial and lasting improvement, it was held that she was not entitled to be allowed any part of such sum in account as against the remainderman.^c

Permissive
Waste in
Buildings.

10. Permissive waste in buildings is the injury happening to them during the term by the permission or neglect of the tenant; that is, an injury, which the tenant might have prevented, by taking care of the building, and doing precautionary repairs.

The obligation to preserve the tenements from waste compels the tenant to keep the walls and timbers of the house from exposure, and renders him liable for any injury the fabric or skeleton of the house sustains for want of such repairs as were necessary to preserve it from exposure. He is not bound to do, and, according to the opinion of two Judges (Mountague and Knightley) in *Dyer*, he cannot do (though this is perhaps going too far) substantial repairs to the skeleton of a house which has become dilapidated from ordinary wear and tear. They say, "The power of the termor to make repairs is

^a *Hibbert v. Cooke*, 1 Sim. and Stu. 552.

^b *Nairn v. Marjoribanks*, 3 Russ. 582.

^c *Caldecott v. Brown*, 2 Hare, 144.

only in small repairs, as to make splents, mend walls, hedges, and ditches; but not in large and principal repairs, as the principal timber and stone walls and tiles; but a covering with thatch he may make."^a

The tenant is bound to keep the external cover-^{Roof.} ings, the roof, and other outworks, of the building in repair, and to renew them when they decay, so as to preserve the timbers, walls, and skeleton from premature decay. His obligation to do such repairs is not absolute, but relative, with reference to the condition of the main timbers and walls of the house in consequence of his neglect to do them. Thus, suffering houses to be uncovered, whereby the spars, rafters, planchers, or other timbers become rotten, is waste;^b but barely suffering them to be uncovered without rotting the timber is not waste.^c Where a tenant permitted the standings before the door of his house to be uncovered and out of repair, whereby the principal timbers became decayed and in danger of falling, it was held to be waste.^d

Glass is an external covering which the tenant is ^{Glass.} bound to keep entire; and if in consequence of the windows being broken, the interior of the house is injured, he is liable for waste.^e Mr. Woods says,

^a *Maleverer v. Spinke*. T. 29 Hen. VIII. Dyer, 36 a. See also *Edwards v. Etherington*, Ry. and Mood. 268. 7 D. and R. 117. *Collins v. Barrow*, 1 Moody and Rob. 112.

^b Co. Lit. 53 a.

^c 10 Hen. VII. 2. *Knoll's case*, P. 9 Jac. C. B. Co. Lit. 53 a. Hale's note, questioned in 18 Edw. III. 15. See also *Hack v. Leonard*, 9 Mod. 91.

^d *Weymouth v. Guilbert*, 8 Car. B. R. 2 Rol. Abr. 814, pl. 6.

^e *Herlakenden's case*, 4 Rep. 63 b. *Corbet v. Stonehouse*, T. 9 Car. II. 2 Rol. Abr. 819, pl. 8. Co. Lit. 53 a.

"That broken glass, according to some surveyors, is not a dilapidation unless there be more than one crack in the pane, or, according to others, while it remains sufficiently entire to exclude wind and weather. The first rule is the more precise, the latter the more reasonable."^a A tenant for life or years under no covenant to repair, which is the case now under consideration, is not liable for waste, however cracked the glass may be. To render him liable, the glass must not only be broken, but the interior of the house must have suffered injury in consequence.

Outer Doors. Outer doors must for the same reason be kept in repair and entire.^b

Internal Coverings.

Plastering.

11. It is also permissive waste if the fabric of the house is injured by reason of the tenant not keeping in repair the internal coverings of the walls. Thus in the case of *Weymouth v. Guilbert*, already cited, the tenant had permitted a chamber to be in decay for want of plastering, whereby the principal timber was rotted and the chamber very filthy and dirty, and it was adjudged to be waste.^c In another case the walls were in decay for want of daubing (or plastering), whereby the timber became rotted; and in another the walls were in decay and out of repair for want of daubing and plastering. The tenants were respectively held liable for permissive waste.^d

^a *Essay on Dilapidations: Essays of the London Architectural Society*, A. D. 1808, p. 133.

^b *Cooke's case*, Moor, 177. M. 24 Eliz.

^c 2 Rol. Abr. 816, pl. 36.

^d *Newell v. Downing*, M. 9 Car. B. R. *Corbet v. Stonehouse*, M. 8 Car. 2 Rol. Abr. 816, pl. 37.

In each of these cases it would appear that the complaint was not the omission to plaster the walls, but the injury to the walls and timber of the house for the want of plaster. The rulings of Lord Kenyon in *Ferguson's case*; of Gibbs, C. J., in *Horsfall v. Mather*; and of Lord Tenterden in *Auworth v. Johnson*; and of Patteson, J., in *Leach v. Thomas*, already referred to,^a as to the obligation to repair of a tenant from year to year, are consistent with and confirmatory of the above authorities.

12. He is also bound to keep filth and water out of the house by repairing the groundsills and drains. ^{In Drains, and not Cleansing.} An action of waste for suffering a kitchen to fall, by reason of the tenant not putting stones under the groundsill, was held maintainable. The Court said, if the tenant suffer the groundsills to waste by neglecting to defend them, or by omitting to remove water, earth, or dung, or other nuisance which lies upon them, he shall be charged equally as if he had broken the groundsills, and the house had fallen in consequence.^b And in another case it was adjudged by the Court, that if for not scouring of a ditch or moat the groundsills of the house are putrefied, waste shall be assigned in *Domibus pro non scourando*.^c

The repairs which a tenant for life or years is bound to do are usually called tenantable re- ^{Tenantable Repairs.}

^a Ante, p. 100. ^b 5 Edw. III. 89. Bro. Abr. Waste, 100.

^c *Sticklehome v. Hutcham*, 28 Eliz., Owen 43. See also *Russell v. Shenton*, 3 Q. B. 449, where the Court held that the occupier, and not the owner of premises, was liable to a stranger for not scouring drains. Of course a tenant for years is not bound to make drains. *Collins v. Barrow*, 1 Moody and Rob. 112.

pairs.* They extend, according to Mr. Woods, only to the finishing, and not to any part of the skeleton of the house; they include the work of the joiner, plasterer, and glazier, but not that of the bricklayer and carpenter. Stopping out wind and weather, as mending tiles and chimneys, are included in tenantable repairs, because such repairs tend to preserve the fabric of the house from premature decay. They are, therefore, intermediate between substantial and ornamental repairs; bricklayers' and carpenters' work being, generally speaking, substantial repairs; and painting, papering, and white-washing, ornamental repairs.

Condition of
the House
when leased.

13. If the house is ruinous at the time of the lease, that is, if the timbers and walls are decayed so that it falls by reason of its age and bad condition, and not by the default of the lessee, it is not waste.^b If the timbers are standing, but the rafters are gone, and it falls during the lease, the tenant is not liable, because he cannot cover the house without rafters, and he is not bound to find them.^c On the point whether if a house is simply uncovered at the time of the lease, the tenant is bound to cover it, so as to be responsible for any dilapidations that may ensue by reason of the want of covering, the authorities are conflicting. Lord Coke^d says that he is not:

* "Tenantable repairs is what one hears of every day, but one knows not what it is unless it is explained by a covenant or an *assumpsit*:" per Mansfield, C. J., *Gibson v. Wells*, 2 Smith, 680.

^b 26 Edw. III. 26. 29 Edw. III. 33. 21 Hen. VI. 46. 10 Hen. VII. 2. Bro. Abr. Waste, pl. 143. 12 Hen. VIII. 1. Bro. Waste, 130. *Maleverer v. Spinke*, Dyer, 36 a. *Ward v. Dettensam*, Moor, 54. *Glover v. Pipe*, Owen, 92.

^c 49 Edw. III. 1. Bro. Waste, 54. ^d Co. Lit. 53 a.

he relies on 40 Ass. 22, where it is said, "If a house newly built, but which has not been covered, be abated by a guardian, he shall not account for waste." Rolle^a says that he is liable, and refers to 7 Hen. VII. 38, where the pleadings assume that it was the duty of the lessee to cover an uncovered house. These authorities may perhaps be reconciled by understanding Lord Coke as referring to an unfinished building, which is not a subject of the law of waste; and Rolle as referring to a house let for the purpose of habitation, and having at the time of the demise some defect in the covering, or other dilapidation, which, if it happened during the term, the tenant would be bound to repair. In such case it would be reasonable to infer that the intention of the parties was that the tenant should repair the defect, so as to preserve the building, during his occupation, from premature decay.^b

14. Waste by fire, when the fire was caused by the negligence of the tenant, and perhaps when the fire happened accidentally and without negligence, was accounted permissive waste under the statutes; and, according to a recent decision, waste by fire, occasioned by negligence, is permissive waste. As the law on this point is not in a satisfactory state, it may be useful to state the authorities in detail.

^a 2 Rol. Abr. 818, pl. 17.

^b See Yelv. 179, Sir John Ratcliffe v. Davis. "If a pawn is of a perishable nature, and no time of redemption is limited, and the pawner waits until it is perished in nature and spoiled, and there is no default in the pawnee, he shall have debt for his money, and the other no remedy for the pawn, for the law as to that part has dissolved the contract. For things in their nature perishable cannot be preserved."

Fleta, who wrote in the reign of Edward I., and cites the statutes of Marlbridge and Gloucester, in his chapter on waste, says, "*Fortuna autem ignis vel hujusmodi eventus inopinati omnes tenentes excusat.*" "But fire by accident, or other unforeseen event of that nature, excuses all tenants from waste."^a

Lord Coke, in his Commentary on Littleton,^b says, "Burning of a house by negligence or mischance is waste." He refers to no authority. This is repeated on his authority in Rolle's Abridgment.^c In the 2nd Institute^d he states that it was adjudged in 9 Edward II., that if thieves burn the house of tenant for life, without evil keeping of the lessee for life's fire, the lessee shall not be punished therefore in an action of waste. It may be inferred, perhaps, from the term '*mischance*,'^e that the lessee was liable for an accidental fire, the cause of which could not be ascertained; or perhaps this term was a mere pleonasm, especially as Lord Coke afterwards cites the passage in Fleta, already referred to, without particular remark. But, from the case cited in the 2nd Institute, it appears that if the lessee could prove that the fire arose from a cause over which he had no control, he would not be liable.

Jermey v. Lowgar^f was an action on the case against lessee for years for burning the house, and the plaintiff recovered. It does not appear from

^a Fleta, b. 1, c. 12, s. 20, cited Co. Lit. 53 b; and Mr. Hargrave's note, Co. Lit. 57 a.

^b Co. Lit. 53 a.

^c 2 Rol. Abr. 820.

^d 2 Inst. 303.

^e See Anon. Cro. El. 10, post, 138. ^f Cro. El. 461. P. 38 Eliz.

the report whether the fire was alleged to have happened through negligence or not. In *Cudlip v. Rundle*,^a the plaintiff declared that he had demised a house to the defendant for seven years, and that he so *negligently and imprudently (improvidently)* kept his fire, that it destroyed the house. He failed merely because the evidence did not support the allegation of a demise for seven years.

In *Hicks v. Downling*,^b the declaration alleged that the defendant, who was lessee for years, negligently and improperly kept his fire, by reason whereof the house was totally destroyed. The plaintiff recovered.

In these two cases it was considered necessary to accuse the tenant of negligence or want of ordinary care. And probably negligence was alleged in *Jermey v. Lowgar*; as, although it was objected that the defendant was not liable for such waste, it does not appear that any objection was taken to the absence of an allegation of negligence, which, if such an objection had existed, would have strengthened the defendant's position.

It will be necessary also to state the cases of fires commencing in one man's house and spreading to his neighbour's, though they belong more properly to the law of nuisance than to the law of waste; because, as will be seen, the liability of tenants for waste, under the statute of Marlbridge, depends upon the doctrine to be deduced from such cases.

Responsibility
for Fire
between
Neighbours.

The earliest case on this subject which I have

^a T. 2 W. & M. 4 Mod. 9. 12 Mod. 14. Cases temp. Holt, 410. 1 Show. 310. Carth. 202. Comb. 177. 3 Salk. 156.

^b M. 8 W. III. 1 Salk. 19; 2 Salk. 723. 12 Mod. 100.

1 Lord Ray, 99.

found referred to is deserving of particular notice for the manner in which it has been cited in Rolle's Abridgment: "A man sued a bill against another for burning his house *vi et armis*. The defendant pleaded not guilty. It was found by the verdict of the inquest that the fire broke out suddenly in the house of the defendant, he knowing nothing of it, and burned his goods, and also the house of the plaintiff. Wherefore, upon this verdict it was adjudged that the plaintiff should take nothing by his writ, but should be amerced."^a

Rolle thus abridges the case: "If a fire suddenly breaks out in my house, I not knowing of it, and burns my goods, and also the house of my neighbour, my neighbour shall have an action on the case against me, 42. Ass. 9. Admitted. But it seems that it was adjudged there that the action did not lie, because it was *vi et armis*."^b

If any thing can be inferred from the Year Book, it is, that it was adjudged that the action did not lie because the fire was not caused by the plaintiff's fault, and not because the action was *vi et armis*. At all events, it does not appear thereby to have been admitted that an action on the case would lie.

The next case on this subject is Sir Wm. Beaulieu v. Roger Fingham.^c The declaration alleged that every person, by the custom of this realm, shall keep his fire *safely and securely*,^d and is bound so

^a Liber Assisarum, 42 Edw. III. pl. 9, p. 259.

^b 1 Rol. Abr. 1. Action on the case, B. pl. 2.

^c P. 2 Hen. IV. 18. Bro. Abr. Accion sur le case, pl. 30.

^d These words *safely and securely* were considered by the Court

to keep it, lest any damage happen to his neighbour in any manner, and that Roger so *negligently* kept his fire, that for want of *due keeping*, his fire spread to the house of William, and William's goods were burned. An objection was taken to the manner in which the custom was alleged; but the Court held that the common law of this realm is the common custom of this realm; and Thirning said, "He shall answer for his fire that by accident burns the goods of others;" but this does not appear to have been acquiesced in by the rest of the Court, and is not abridged by Broke.

Markham said, "A man is in such cases bound to answer for the act of his servant, or his guest; for if my servant or my guest puts a candle in a window, and the candle sets fire to straw, and burns my house and the house of my neighbour, I shall be responsible to my neighbour;" which was agreed to by the Court. This is the only part of the case noticed by Broke.

Markham said further, "I shall answer to my neighbour for him who enters my house by my leave or knowledge; but if a man out of my house, against my will, sets fire to straw in my house, whereby my house and that of my neighbour is burned, I shall not be responsible, because that cannot be said to be ill on my part, but against my will."

of Common Pleas, in *Ross v. Hill*, 2 C. B. 889, to mean with ordinary and proper care; and the precedent in *Rastall* for an injury by fire spreading, which is founded on this Year Book, was referred to by the Court.

Horneby (the defendant's counsel): "This defendant will be ruined and for ever impoverished; for if this action can be maintained against him, twenty other like suits will be commenced for the same matter." Thirning's answer is characterized by a professional zeal which may be termed noble or narrow-minded, as the reader is disposed to consider that the law should accommodate itself to the exigencies of mankind, or that every thing should bend to the law: "What is that to us? It is better that he should be entirely ruined, than that the law should be changed for him."

It will be observed that the declaration charged the defendant with negligence, and Markham distinguished between a fire happening by the want of care of the defendant, or those under his control, and one otherwise occasioned.

In another Year Book^a is reported an action brought because the plaintiff's house was burned by the fire of the defendant, by reason of the *default* of the defendant in not *properly* keeping his fire.

In another case it appeared that a man standing at his own door shot at a fowl, and, in so doing, fired his own house and the house of his neighbour. An action on the case was brought, not expressly founded on the custom of the realm, and this was made an objection; but the Court said that the action would lie, although this *mischance* was not by a common negligence, but by a misadventure.^b This was plainly a case of negligence.

^a 28 Hen. VI. 7.

^b Anon. Cro. El. 10, pl. 5. M. 24 and 25 Eliz. An act caused by negligence is here called a mischance.

In *Crogate v. Morris*^a it was said, "If my friend come and lie in my house, and set my neighbour's house on fire, an action lieth against me." This appears to have been an observation made by way of illustration, and was probably an allusion to the dictum of Markham already cited.

In *Panton v. Isham*^b the declaration alleged that the defendant *so negligently* kept his fire, that six stables, &c. of the plaintiff were burned.

Turberville v. Stampe^c was an action on the case on the custom of the realm for negligently keeping a fire lit in a field, which extended to the plaintiff's field, and burned his clothes. It was objected, in arrest of judgment, that the custom was confined to a fire in a house, and did not extend to a fire in a field; but the Court (three Judges against one) overruled the objection, and resolved that a fire made in a field was within the custom, and that the action was maintainable by reason of the negligence which was alleged in the declaration, and could not then be disputed: they admitted that if the fire of the defendant by inevitable accident, as by impetuous and sudden wind, without the fault of the defendant or his servants, had set fire to the plaintiff's clothes, he would not have been responsible. Holt, C. J., said,—“If a stranger sets fire to my house, and burns my neighbour's, no action lies against me;” to which all the Court agreed.

^a Brownlow, 197. M. 15 Jac.

^b P. 5 W. & M. 3 Lev. 359. 1 Salk. 19.

^c M. 9 W. III. Comyns, 32. 12 Mod. 151. 1 Salk. 13.
1 Lord Ray, 264. Skinner, 281. Cases temp. Holt, 9. Carth. 425. Comb. 459.

In Comyns' Digest it is said, that in an action for negligently keeping a fire "the defendant may plead that an unknown person set fire to his house, per quod, and traverse the negligence."^a

Soon after the case of *Turberville v. Stampe* was passed the statute 6 Anne, c. 31, which is entitled "An Act for the better preventing mischiefs that may happen by fire;" and after several provisions for that purpose, some relating to the metropolis, and some general, it enacted—"That no action, suit, or process whatsoever should be had, maintained, or prosecuted against any person in whose *house or chamber* any fire should *accidentally* begin, nor any recompense be made by such person for any damage suffered or occasioned thereby; any law, custom, or usage to the contrary notwithstanding."^b

It further provided that nothing therein contained should extend to defeat or make void any contract or agreement made between landlord and tenant;^c and further, that so much of the Act as related to the *indemnity* of any person in whose *house or chamber* any fire should *accidentally* begin, should continue for the space of three years, and from thence to the end of the next session of Parliament, and no longer.^d 10 Anne, c. 14, s. 1, recited s. 6 of 6 Anne, c. 31, and enacted that such clause should be and was thereby revived and made perpetual. The statute 6 Anne, c. 31, was repealed by 12 Geo. III. c. 73, a Metropolitan Building Act; but the enactment of s. 6 and the proviso of s. 7 were

^a Com. Dig. Pleader, 2 P. 3, citing 1 Bro. Ent. 29.

^b S. 6.

^c S. 7.

^d S. 8.

re-enacted in the same words.* This statute was in its turn, together with the statute of Anne, repealed by the penultimate Building Act, which contains a similar provision to those of s. 6 and 7 of 6 Anne, with this difference: instead of the words "any person in whose *house or chamber* any fire shall accidentally begin," the words are, "any person in whose house, chamber, *stable, barn, or other building, or on whose estate* any fire shall accidentally begin."^b This provision is still in force, since the last Building Act repeals the 14 Geo. III. c. 78, except so far as it repeals any other Act either wholly or partly (which prevents the former statutes from reviving): "And except the whole of the several sections of the Act as relate to legal proceedings in respect of accidental fires," (s. 86)^c (thus stated in the Act by way of inuendo).

From the time of the passing of 6 Anne until recently, it appears to have been the opinion of the profession and the public (so far as such opinion can be collected from the reference to the statute in books of authority, and the absence of any action, either by landlord against tenant, or neighbour against neighbour, for injuries caused by the spread of fire), that an action could not be maintained for negligently keeping a fire.

At the end of the report of *Turberville v. Stampe*, in the cases in the time of Lord Holt, the reporter adds "N. B. the statute of Anne," and says, "Query if the above action would lie at this day? It is not within the words, and perhaps not within the

* 12 Geo. III. c. 73, s. 37. ^b 14 Geo. III. c. 78, s. 86.

^c 7 & 8 Vict. c. 84, s. 1. Schedule A.

reason of this Act of Parliament.”^a *Turberville v. Stampe* was the case of a fire in a field; the statute of Anne provides only for the cases of fires in houses or chambers.

Lord Chief Baron Comyns, after digesting the points of law as to nuisance by fire, says,—“*And now by the statute of 6 Anne,*” and which he sets out in terms, as though he considered that it had altered the law of those cases.^b

In Bacon’s Abridgment, the statute of Anne is quoted as containing the law on the subject, and the above cases are referred to generally as showing what formerly was the law.^c

Blackstone, in his chapter on Master and Servant, says, “By the common law, if a servant kept his master’s fire negligently, so that his neighbour’s house was burnt down, an action lay against the master; but now the common law is altered by the statute 6 Anne.” On this passage Mr. Justice Coleridge notes that the statute is repealed, but that a similar provision is made by the repealing statute 14 Geo. III. c. 78.^d Great stress was laid on these passages in Bacon’s Abridgment and Blackstone by Lord Lyndhurst in *Viscount Canterbury’s* case, and their value as authorities on this subject has been thereby considerably increased.

Mr. Hargrave (no mean authority), in an elaborate note in his edition of *Coke upon Littleton*, treats of the law of waste by fire: he says, that at common law lessees were not liable for accidental or negli-

^a Cases tempore Holt, 9.

^b Com. Dig. Action on the case for negligence. A. 6.

^c Bac. Abr. Action on the case. F. ^d 1 Black. Com. 431.

gent burning, which is proved as to the accidental by *Fleta*, as to the negligent by the Countess of Shrewsbury's case; that the statute of Gloucester made them liable for destruction by fire, but by the statute of Anne the ancient law is restored; and the distinction introduced by the statute of Gloucester between tenants at will and other lessees is taken away.^a

If this reading of the statute of Anne was an error, it was a common error; and it is an established and wise maxim of law, "*Communis error facit jus.*" That rule which is commonly understood and acted upon by parties interested in a subject, although it may have originated in error, is the law of their actions, and it is unjust to depart from it because the one has acted and the other has suffered upon the assumption that such is the law. It is not meant that a party may have been less careful in keeping his fire in consequence of this error, and therefore that he ought to be irresponsible: if the error had such an effect, the sooner it was corrected, the better. The injury a person himself sustains in such cases is sufficient to keep him as careful as he can be kept. What is intended is, that after the fire, the party in whose house it began, and the party to whose house it spread, may have regulated their respective affairs differently by reason of the error; and the one will be disappointed and the other surprised if afterwards told that what they believed was erroneous.

Vaughan v. Menlove^b is the first reported case on this subject after *Turberville v. Stampe*. The

^a Co. Lit. 57 a, n. 1. Co. Lit. 53 a, *note*.

^b H. 1837. 3 Bing. N. C. 468. 4 Scott, 244.

defendant's hay-rick ignited spontaneously, under circumstances from which negligence might be imputed to the defendant, and the fire communicated to the plaintiff's cottages, which were destroyed: the Court held that the action was maintainable. The statute 14 Geo. III. c. 78 was not adverted to by the Court or counsel. A case was there cited by Talfourd, Serjeant, which had been tried before Alderson, B., at the Berkshire Assizes, where a man set fire to reeds in his field, and the fire communicated to his neighbour's premises, and did him damage, and in which the plaintiff recovered.

On the occasion of the great fire by which the Houses of Parliament were destroyed, Viscount Canterbury (the then Speaker), whose property was destroyed, presented a petition of right to the Crown for compensation, alleging that the fire was caused by the negligence of the servants in charge of the Houses. The general question of liability in cases of injuries by fire was elaborately argued before Lord Lyndhurst, C.; and it was contended, on the part of Lord Canterbury, that before the statute of Anne, the law presumed negligence in such cases, and that the master of the house in which the fire arose was only excused upon showing that the calamity was occasioned by some cause which he could not resist or control; and that the effect of the statute of Anne was merely to throw the burden of proving negligence on the plaintiff alleging it, and not to exempt parties from responsibility where conflagrations were caused by the negligence of themselves or their servants. Though his Lordship left the question undecided, he cited

the passage from Blackstone's Commentaries with apparent approbation, and commented on the fact that it had never been disputed: he said, "I do not recollect, in the course of a pretty long professional life, any instance of an action having been brought to recover compensation for this species of injury, nor do I find in the books any trace of such a proceeding."^a

Still more recently an action on the case was brought for the defendant having kept a fire in his close negligently, and at a time when by reason of the state of the wind and weather it was dangerous and improper so to do, by reason whereof, and of the negligence of the defendant and his servants, and for want of due care and caution, the fire extended from the defendant's close into the plaintiff's, and destroyed the plaintiff's trees, hedges, and fences. It was objected in arrest of judgment, that the defendant was protected from liability by 14 Geo. III. c. 78, s. 86. The Court of Queen's Bench gave judgment for the plaintiff. They said, "The ancient law or custom of England appears to have been, that a person in whose house a fire originated which afterwards spread to his neighbour's property and destroyed it, must make good the loss; and it is well established, that when a fire is occasioned by a servant's negligence, the owner, the master of the house where it begun, is answerable for the consequences to the sufferer." They held, upon the authority of *Richards v. Easto*,^b that 14 Geo. III. c. 78, s. 86, was a general law, and not

^a Viscount Canterbury v. The Attorney-General, 1 Phil. 260.

^b 15 M. and W. 244.

confined to the metropolitan district, to which some of the other provisions are limited ; that the word "estate" in that section extended to land not built upon, and made the owner of such land irresponsible in the same manner as the statute of 6 Anne did the owner of a house or chamber ; but they decided that a conflagration caused by negligence was not an accidental fire within the meaning of the statute.*

It is an observation that arises on the report of this case, that the Court do not appear to have formed an exact idea of the law as it stood before the statute of Anne. The first branch of the sentence in which they state such law conveys the idea that the master of a house was absolutely and without qualification or exception liable for the spread of fire commencing in his house ; but afterwards they say that he was liable for negligence of his servant,—an unnecessary statement if the first branch correctly states the law, since it neither illustrates the rule already stated, nor states an additional one. If it has any meaning, it qualifies the first part of the sentence, and amounts to an admission that by the law before the statute the master was only liable for the spread of fire where it was caused by the negligence of him or his. And such appears to be the result of the cases before the statute. In each of them the defendant is accused of negligence, and none of them warrant the proposition that a party was liable for an injury happening from mere accident, and not caused by negligence. Nor can it be fairly inferred from them that the defendant was in such cases bound to disprove negligence ; nor can

* *Filliter v. Phippard*, Decr. 1847, 12 Jur. 202.

it be inferred from the language of the statute that it was the intention of the Legislature merely to alter a rule of evidence, and relieve the defendant from the burden of disproving negligence, and impose on the plaintiff the burden of proving it. The apparent effect of the statute is to exonerate parties in whose houses fires began from a liability they were then by law subject to. The statute of Anne calls it "*an indemnity*." If at the time of the statute occupiers of houses were only liable for the spread of fires caused by negligence, the Legislature either meant 'fires caused by negligence' by the term "accidental fires," or they meant nothing.

The term 'accident' is frequently used in contradistinction to 'design.'* If every possible event may be classified either as 'accidental' or 'designed,' no one will have much difficulty in determining under which head a conflagration happening through want of care should be ranged. The Legislature may have used the term 'accidental' in this sense, and such appears to have been the general understanding.

Considering the disastrous effects of conflagrations, the great loss the party causing the fire usually sustains, and the small expense for which at the present day such losses may be insured against, the case of injuries by fire, even when caused by negligence, does seem one in which the rigour of a rule of law should be tempered with mercy; and it may be supposed that the Legislature intended to do so by

* See Johnson: 'accidental'—'casually'—'casualty.'—"Thy sin's not *accidental*, but a trade."—*Measure for Measure*.

the statute of Anne: and if they intended to do so, it is difficult to say that they have not carried their intention into effect. Such injuries may be considered as happening as much, or more, by reason of the nature of fire, which every body must use, and every body may misuse, as from the neglect of the party. The inconsistent case of *Panton v. Isham*, in which it was decided that the defendant was not liable to his landlord for burning his own house, but was liable for the destruction, by the same fire, of the adjoining houses, which belonged to his landlord, happened shortly before the statute of Anne, and may be supposed to have influenced the Legislature.

The case of *Filliter v. Phippard* is of great importance to tenants for life and years. The effect of it is to render them liable for the destruction of the premises by fire happening by the negligence of themselves or their servants; and it seems that in some cases negligence may be presumed from the mere circumstance of the conflagration, and the burden of showing that precautions were taken, or accounting for the fire, may be on the tenant.*

Waste by
Strangers.

15. If a tenant suffer a stranger to do waste, he shall be answerable; for it is presumed in law that the tenant may withstand it, *et qui non obstat quod obstare potest, facere videtur*. Another reason given for making the tenant liable for waste done by a

* *Piggott v. the Eastern Counties Railway Company*, 3 Com. Bench, 229. In *M'Kenzie v. M'Leod*, 10 Bing. 388, a case as to the liability of a tenant for accidents by fire, by the law of Scotland, Tindal, C. J., there says, "In England, where by custom a tenant is bound to repair under the common law, he is not liable to rebuild in the case of fire."

stranger is, that he has a remedy against the stranger. "The law," says Lord Coke, "doth give to every man his proper action, so as none of them be without due remedy; and therefore in this case the lessor shall have his action of waste against the lessee, and the lessee his action of trespass against him who did the waste; and so the loss, as reason requires, in the end shall be upon the wrongdoer: and if the lessor should not have his action of waste, he should be without remedy."^a Every description of tenant for life or years is liable for waste by a stranger, such as tenant by the curtesy and tenant in dower; and the fact of the tenant being an infant or feme-covert affords no exemption.^b But a guardian is not liable for waste done by a stranger.^c From the case cited in the 2nd Institute, and already referred to, of the house of a tenant for life being burned by thieves, and in which it was held that the tenant was not liable, it may be inferred that the tenant is only liable for those acts of waste committed by strangers which do not exceed a civil trespass, which he might reasonably have resisted, and for which it may be presumed he has an adequate remedy against the wrongdoer, and that he is not liable for acts of waste by strangers amounting to felony.

Being liable for waste by a stranger, of course ^{By Under-Tenant.} the tenant is liable for waste by his under-lessee, to whom he has given the opportunity of committing such waste;^d and a guardian is liable for waste by

^a 2 Inst. 145. 2 Rol. Abr. 821. Leon. 264, pl. 354.

^b Co. Lit. 54 a. 2 Inst. 303.

^c F. N. B. 60 G. 44 Edw. III. 27 b. Co. Lit. 54 a.

^d 49 Edw. III. 26 b.

those with whom he is connected by privity of estate, as where an abbot was guardian, and one of his monks committed waste;^a and where joint tenants are guardians, and one of them does waste, both are liable.^b

Liability of
Stranger.

Notwithstanding what is said by Lord Coke, it seems that where waste is committed by a stranger, the lessor has his election either to sue the lessee or the stranger for the injury done to his reversion. In *Jefferson v. Jefferson*,^c which was an action by a party entitled to a remainder in fee of a copyhold against the husband of the tenant for life for prostrating the house, Pemberton, C. J., and Levinz, J., held that if a stranger cut trees, the copyholder might maintain trespass, and the lord might have another action for the prejudice to his inheritance; and so if the land was leased for years, case would lie by the reversioner for the injury to his inheritance; and if a stranger built a house on lands in the possession of lessee for years, case would lie for the reversioner. And, in *Biddlesford v. Onslow*,^d an action was brought by a landlord against the tenant of the adjoining land for stopping up a rivulet, whereby the plaintiff's close was flooded, and the timber trees destroyed. The defendant pleaded that he had satisfied the tenant of the close; which the Court held to be no plea, because the plaintiff might maintain an action in respect to the prejudice to his reversion, and the tenant in respect of his possession. In *Tomlinson*

^a 49 Edw. III. 26 b.

^c 3 Lev. 130.

^b Co. Lit. 54 a. 2 Inst. 305.

^d 3 Lev. 209.

v. Brown,* the same law was held in an action by a landlord against a stranger for obstructing lights and breaking his wall. *Attersoll v. Stevens*^b was an action by a tenant for years against a stranger for taking 38½ acres of brick earth. The plaintiff held under a lease for 21 years, with liberty to dig half an acre annually without paying any additional rent. If he should dig more, he covenanted to pay £375 per half acre. The jury gave the whole value of the 38½ acres of brick earth taken by the defendant. *Chambre, J.*, held that the damages were excessive, because the plaintiff was not liable on his covenant for the act of the defendant, and the defendant was liable to the landlord for the value of the soil taken. *Heath, J.*, and *Mansfield, C. J.*, decided that the damages were properly assessed; *Heath, J.*, saying that by the terms of the lease the soil was sold to the tenant, and that therefore the landlord could maintain no action against the defendant; and *Mansfield, C. J.*, saying that he concurred in the greater part of the law as stated by *Chambre, J.*, but considering that the lessee, by suing for the whole value of the earth, had made his election to take it under the terms of his lease, as he was at liberty to do. The law upon this subject is not altogether free from difficulty. The landlord has his election, either to sue his tenant or the stranger for waste done by the stranger, and recover a full compensation from either. The tenant also is entitled to sue the stranger, and

* Cited by *Aston, J.*, in 4 Bur. 2141, *Jesser v. Gifford*. According to the report in *Sayer*, 215, this action was by lessor against lessee.

^b 1 Taunt. 183.

being liable to his landlord, is entitled to recover sufficient to indemnify him against such liability. Suppose that the tenant first sued the wrongdoer, and recovered the full amount of the damage done, and then the landlord sued him; it would not be just that the tenant should recover in respect of a liability he had not incurred, or that the wrongdoer should pay a double compensation for one wrong. In such case the wrongdoer ought to have a remedy over against the tenant, to recover the amount paid him in respect of the injury to the landlord's reversion, which, by suing for and receiving, the tenant would become bound to apply in satisfaction of the landlord.

Inevitable Accidents.

16. For dilapidations occurring by inevitable accident a tenant is not answerable, as where a house is destroyed by the King's enemies, who are not amenable to the law, or by superhuman agency, as by lightning or tempest.^a And where a house has been blown down by tempest, it is not waste for the lessee to sell the materials, because they have become chattels.^b But if a part of the house which the tenant is bound to repair is destroyed or injured by tempest, he is bound to restore it; as if a house is uncovered by tempest, but the timber is left standing, and it afterwards fall for want of covering, the tenant is liable for waste:^c and if a tempest

^a 2 Inst. 303. Doct. and Stu. D. 2, c. 4. 40 Edw. III. 44. Bro. Abr. Waste, pl. 39. 12 Hen. IV. 4. Bro. Abr. Waste, pl. 69. 18 Hen. VI. 33. Co. Lit. 53 a.

^b 29 Edw. III. 33. 40 Ass. 22. He would in such case be liable to the lessor in trover.

^c Co. Lit. 53 a. Bro. Abr. Conditions, pl. 40. 12 Hen. IV. 5. Bro. Abr. Waste, pl. 69.

take away a small part of the thatch, the tenant is bound to repair it; and if he neglect to do so, and in consequence the house is thrown down by tempest, he is liable for waste.^a

Where lands are flooded in consequence of the decay of a wall of the sea, or the banks of rivers, it is waste in the tenant; but if the lands be damaged by the sudden rage and violence of the sea, or by a sudden flood of the river, it is not waste;^b and it has been held, that if the banks of the Trent be unrepaired, it is waste, because the Trent is not so violent but that the lessee, by his policy and industry, may well enough preserve the banks.^c

17. A covenant to repair is negative as well as positive in its obligation; and the tenant is thereby bound as well not to do an act amounting to voluntary waste as to repair dilapidations. Thus an alteration of the demised premises is a breach of a covenant to repair: for example, breaking a doorway through the house demised into the adjoining house.^d So the act of pulling down a brick wall, which divided one part of the demised premises from another, was held to be a breach of a covenant to repair and uphold the brick walls belonging to the demised premises.^e

But where the covenant was, that the tenant should leave the premises in as good plight as he found them, and he pulled down houses, the lessor it was held could have no action until the end of

^a Moor, 62. T. 6 Eliz.

^b Co. Lit. 53 b.

^c Griffith's case, Moor, 69.

^d Doe d. Vickery v. Jackson, 2 Stark. 293.

^e Doe d. Wetherell v. Bird, 6 Car. and Payne, 195.

Covenant to
repair; Altera-
tions.

the term, for the covenant had relation thereunto; but that if he had wasted the woods, covenant would have lien, because it would be impossible to repair such waste.^a

And if from the language of the lease it appears that the parties contemplated alterations being made, an alteration is no breach of the covenant to repair. Thus, where the covenant was to repair the demised premises, together with such buildings, improvements, and additions, as at any time during the term should be erected, set up, or made by the tenant, it was decided that the tenant had not broken the covenant by converting the windows on the ground floor into shop windows, and stopping up an internal door in one place, and opening one in another.^b

Wear and
Tear.

18. A covenant to repair obliges the lessee at all events to repair and restore those parts of the building which fall away, wear out, or are destroyed during the term. He is not bound to repair parts which are merely in progress of decay. His covenant is to repair all accidents, and to take all reasonable precautions against the fabric of the building being exposed to the weather, or becoming more depreciated than it necessarily would from time and ordinary use.

The covenant must be construed with reference to the age and general condition of the building at the commencement of the term. The covenant to repair is not a covenant to improve, or to keep and

^a F. N. B. 145 I. (342.) *Walter v. Mountague*, 2 Rol. Rep. 347.

^b *Doe d. Dalton v. Jones*, 4 B. and Adol. 126.

yield up the building demised in as perfect a state as when demised, but to keep it, as nearly as possible, in the same state as when demised, and to do such repairs as are adapted to the nature of the building.

The obligation imposed by the covenant to repair differs from the common law obligation against permissive waste in this. The common law obligation is merely to guard the fabric of the building from decay, and is not infringed by an external dilapidation unless the fabric is injured in consequence. By the covenant the tenant is unconditionally bound to repair all dilapidations, whether the fabric of the building is injured or not. Injuries to the building caused by inevitable accident are excepted from the common law obligation, but not from the obligation of a general covenant. The obligation of a covenant differs from the obligation of an ecclesiastic in this. The ecclesiastic is bound to repair buildings and parts of buildings about to fall away (*proximo casuras*)—those parts which are nearly but not quite worn out. The covenantor is only bound to repair those parts which are actually fallen away and worn out.

The cases on this subject may be divided into those where the dilapidations have been caused by neglect or decay, and those where they have happened accidentally without default of the tenant.

In *Harris v. Jones*,* a *Nisi Prius* case tried before Tindal, C. J., the covenant was well and sufficiently to repair with all needful reparations, cleansings, and amendments, and to leave the premises in good and

* 1 Moody and Rob. 173. C. P. Hil. 1832.

substantial condition. The tenant proved generally that he had laid out money from time to time in repairing the house, and that the premises were in better repair at the end of the term than at the beginning, and that the house was in tenantable repair. It appeared, on the part of the landlord, that glass in the skylight was broken to the amount of 40s.; that iron rails, tiling, and coping were dilapidated. The Lord Chief Justice said, "The question was, whether the covenant had been really and substantially complied with. The defendant was only bound to keep up the house as an old house, not to give the plaintiff the benefit of new work. On the whole, the jury were to say whether the particulars enumerated by the plaintiff's witnesses were dilapidations amounting to a substantial breach of covenant." The jury found for the defendant.

The ruling in this case may perhaps be thought deficient in precision. It appears to have been left to the jury to say whether the defendant had done a reasonable quantity of repairs, not whether he had done all the repairs which were requisite to keep the premises in as good a state as when demised. Although it is an authority in support of the principle that the covenant to repair must be construed with reference to the age of the building and its condition when demised, it can hardly be considered as an authority that a tenant under covenant to repair may leave glass, tiling, coping, or railings broken.*

* See *Pyott v. Lady St. John*, Cro. Jac. 329, where broken glass was held to be a dilapidation within a covenant to repair. It is not clear from the report whether it was not cracked glass which was held a dilapidation.

*Gutteridge v. Munyard** was an action for the breach of a general covenant to repair a place called the Chicken House, which was a very old building, of the age of between two and three centuries at the least. It was in a very dilapidated state; the walls had cracks in them, and were out of the perpendicular; the floors sunk; many of the timbers rotten; the tiling, and woodwork of the sashes broken. It was tried before Tindal, C. J., who thus directed the jury:

“Wherever an old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored, in a renewed form, at the end of the term, or of greater value than it was at the commencement. What the natural operation of time, flowing on, effects, and all that the elements bring about in diminishing the value, constitute a loss, which, so far as it results from time and nature, falls upon the landlord. But the tenant is to take care that the tenements do not suffer more than the operation of time and nature would effect. He is bound, by seasonable applications of labour, to keep the house, as nearly as possible, in the same condition as when it was demised. If it appear that he has made these applications, and laid out money from time to time upon the premises, it would not, perhaps, be fair to judge him very rigorously by the reports of a surveyor, who is sent upon the premises for the very purpose of finding fault.” The jury found for the defendant in this case. The verdict seems to have been found on the ground that the defects in the

* 1 Moody and Rob. 334. 7 C. and P. 129. C. P. Hil. 1834.

building were the mere effects of time, and that the building required to be rebuilt rather than repaired. The broken tilings and woodwork, which, in ordinary cases, would be dilapidations, were perhaps not deemed so in this case, because the fabric of the building was in such a state that the repair of the tiles and sashes would not have made it more valuable or tenantable.

The walls and beams were merely wearing, and were not worn out; the case therefore does not decide that the tenant would not have been bound to rebuild, had the house actually fallen.

In *Stanley v. Twogood*,^a the covenant was to preserve, keep, and leave the house in good and tenantable order and repair. It appeared that the house was an old house. The defendant proposed to show in what state the house and fences were at the time of the demise; but Bolland, B., rejected the evidence. The Court of Common Pleas refused to disturb a verdict for the plaintiff; Tindal, C. J., saying that the question was, whether the house was in a substantial state of repair, as opposed to mere fancied injuries, such as a mere crack in a pane of glass, or the like; that although the state of repair at the time of the demise was not to be taken into consideration, yet it would make a difference whether the house were new or old at the time of the demise.

In *Burdett v. Withers*,^b the Court of King's Bench held that the defendant in an action on a covenant to repair was entitled to prove the state

^a C. P. 1836. 3 Bing. N. C. 4. 3 Scott, 313. 2 Hodges, 132.

^b T. 7 W. IV. K. B. 7 A and E. 136. 2 N. and P. 122.

of the premises at the time of his coming into possession.

In *Muntz v. Goring*,^a Coltman, J., refused to allow the defendant to examine witnesses as to whether some of the defects complained of had not existed previous to the lease, and ruled that the defendant might show generally in what state of repair the premises were at the commencement of the term, but could not go into matters of detail. The Court confirmed the ruling; Tindal, C. J., remarking, that the same nicety of repair was not required for an old building as a new one.

In *Doe d. Pittman v. Sutton*,^b the covenant was that the defendant would forthwith put the premises into complete and substantial repair. A surveyor proved that the premises were not in repair, that one of the chimneys had bulged, a drain was stopped, some iron stays were wanting to support a chimney-shaft, the roof was out of repair, a dormer door was defective, the floor of a room was shored up, two ridge-tiles were broken, some weather-boarding required repair, and a window was broken. The tenant proved that he had expended £500 in repairs; that the bulging of the chimney was caused by an under-tenant keeping granite on the floor, which was shored up, and did not arise from want of repair; that the roof was sufficient to go through the winter. Lord Denman directed the jury that they were to put a reasonable construction on the covenant, and say whether the defendant had or had not performed it; that it was impossible

^a E. 1 Vict. C. P. 4 Bing. N. C. 451, nom. *Young v. Muntz*, 6 Scott, 277.

^b 9 Car. and Payne, 736. H. 4 Vict.

strictly to construe the covenant; the word 'forth-with' did not mean either a day or a week, but that the jury were to say whether, on a reasonable construction of the terms of the covenant, the defendant had really done what he reasonably ought in the performance of it. The jury found for the defendant.

In *Belcher v. M'Intosh*,^a the covenant was to put the premises (which were principally stabling, very old, and out of repair, and the roofs leaky) into habitable repair. Alderson, B., held that the defendant was bound to repair the premises in such a way that they might be dwelt in, not only with safety, but with reasonable comfort, by the class of persons by whom, and for the sort of purposes for which, they were intended to be occupied: he distinguished between putting and keeping the premises in repair, and seemed to consider that although the one expression signified that the tenant was to improve the premises, the other only implied that he was to keep them in the same state as they were at the time of the taking.

But in *Payne v. Hayne*,^b the Court of Exchequer held that by a covenant to keep in good repair the tenant was bound to put the premises into good repair, because if in bad repair at the date of the lease, he could not keep them in good repair without first putting them into that state; but that the age and class of the premises, with their general condition as to repair, ought to be taken into consideration, in order to measure the extent and nature of the repairs to be done.

^a H. 2 Vict. 2 Moody and Rob. 186. 8 C. and P. 720.

^b Ex. H. 10 Vict. 16 M. and W. 541.

Although a tenant under covenant to repair is bound to repair any particular dilapidations that may exist at the commencement of the term, such as broken windows or broken tiles, he is not bound to do any new work whereby the buildings will be improved, nor is he bound to repair dilapidations on an improved plan, so as to make the premises better than they were before they happened.

Thus *Collins v. Barrow*,* where the defendant had by writing agreed to keep the premises in tenantable repair, and the house was unfit for occupation for want of sufficient drainage, and could not be kept perfectly dry without the construction of a sewer, is an authority that a tenant who agrees or covenants to repair is not, under such circumstances, bound to make a sewer; although the decision is overruled as to the point that he may quit and is excused from payment of rent when the premises become untenable for want of repairs which he is not bound to do. In that case evidence was given by the landlord, that by occasional pumping, the premises might have been kept dry without a sewer. Bayley, J., said, that if the pumping would only have succeeded by the defendant giving up an extravagant quantity of time to it, he did not think he was bound to do that. On this point, perhaps, the case cannot be relied on. If a man agrees to do a thing, he must do it, however difficult.

In another action for dilapidations it appeared that the kitchen floor was in a very bad state, and the joists rotten from having laid on the earth; and

* 1 Moody and Rob. 112. T. 1 W. IV.

in doing the repairs the landlord's carpenter placed the joists on brickwork, so as not to touch the earth, which he considered would last much longer. Lord Abinger held that the tenant was not liable to the costs of so laying the joists.*

Obligation to
rebuild when
House falls
from Decay.

If the house falls merely from natural decay, and without default of the tenant, it would seem that he is not bound to rebuild it under an ordinary covenant to repair. A bond was conditioned to sustain and repair a messuage. The defendant pleaded in excuse of performance that a kitchen, parcel of the messuage, was so ruinous that it could not be repaired, and that he pulled it down and rebuilt it in a convenient time. It was held to be no plea; the Court saying, if the condition was impossible, the obligation was single.^b If a bond has an impossible condition, *i. e.* impossible at the time the bond is made, not one which afterwards becomes impossible, the condition is void, and the bond is single, it being necessary for the obligor to show performance of the condition, to save the forfeiture of the bond.^c An impossible covenant is equally void with an impossible condition.^d If a man covenants to keep in repair a building which cannot stand during the term, he covenants to do that which is impossible at the time of the covenant, and is therefore excused from performance. In *Jones d. Cowper v. Verney*,^e Willes, C. J., assumed that a covenant to repair and uphold implied that the

* *Soward v. Leggatt*, 7 C. and P. 613. M. 7 W. IV.

^b *Wood and Avery's case*, 2 Leonard, 189.

^c *Com. Dig. Condition D. 1.*

^d *Shep. Touchstone*, 164.

^e *Willes*, 175. See *Com. 632*, *Chesterfield v. Bolton*.

lessee should rebuild in case the building fell down: he decided that he was not authorized by such a covenant to pull down and rebuild. But in *Belcher v. M'Intosh*,^a Alderson, B., is reported to have said, "No one is bound to give his landlord a new house instead of an old one. If a house falls down by mere old age, a tenant is not bound to put up a new one. If it falls down by the fault of the tenant, it is otherwise." The case of *Gutteridge v. Munyard* favours the same view.

But where a bond was conditioned that the lessee of a copyhold should not commit any manner of waste, and should do no other thing that should be a forfeiture of the copyhold; the premises demised were ruinous at the time of the lease, and, in consequence, fell. This was held a breach of the condition.^b This case is not inconsistent with the foregoing, the condition of the bond being not merely against waste, but against doing any thing to cause a forfeiture of the copyhold.

If by the act of God, happening after the covenant, it becomes impossible to perform it, the lessee is excused; as if he covenants to repair before a day, and it happen that the plague is in the house before and until the day, and therefore it is not done, the lessee is excused. He must repair in a convenient time afterwards, otherwise the covenant will be broken.^c

19. Under a general covenant to repair, the tenant *Painting*. is bound to keep in repair the inside painting, and this although he expressly covenants to paint the

^a 8 C. and P. 723. See *Doe d. Worcester Trustees v. Rowlands*, 9 C. and P. 734.

^b *Glover v. Pipe, Owen*, 92.

^c Hil. 8 Jac., *Shep. Touch.* 174.

outside. In *Monk v. Noyes*,^a Abbot, C. J., held that the defendant, who had covenanted substantially to repair, uphold, and maintain the house, was bound to keep up the painting of inner doors, inside shutters, &c. In *Hopkinson v. Viand*,^b the covenants were to paint the outside wood and iron work once in three years, and to do all things necessary for upholding and sustaining the premises in good and substantial repair. The jury having inquired whether the inside painting was included in the agreement, Lord Denman told them that they might take it into account under the head of general repairs. The Court refused a new trial, because if the premises were ruinous for want of inside painting, the defendant was liable for not doing it; and there was nothing to show that the jury had not given the damages on that ground, Lord Denman admitting that the direction might have been more particular. And in *Johnson v. Gooch*,^c in which case there was a covenant to paint the outside every fourth year, and to keep the premises during the term in necessary repairs and amendments, and to deliver them up in all things well and sufficiently repaired, Parke, B., at *Nisi Prius*, held that the covenants would render it necessary for the tenant to paint the inside if the walls were so stained and blemished that they could not be put in fair and proper repair short of general painting. If there were only a few stains, spots, and blemishes on the walls in the ordinary wear and tear, which a skilful

^a 1 C. and P. 265. E. 5 Geo. IV.

^b 10 Law Times, 108. M. 1847.

^c 11 Law Times, 315. T. 1848.

artist might well repair and repaint in detail and set to rights, then the defendant was not bound to paint generally.

The inside painting is part of the demised premises; if worn off, it must be renewed under a general covenant to repair, as a part worn away; if stained, spotted, and blemished, it may be considered as destroyed.

20. Where any part has fallen away, the tenant Materials. is not bound to replace it with new materials, but only with materials of the same value and in the same condition as those deficient ought to have been, had they only been subject to ordinary decay and wear, except from accident or exposure to the weather. In determining this, reference must be had to the age of the building at the time of the lease granted, and to the duration of the lease; and so much ought to be deducted from the cost of new materials as it may be supposed they would be depreciated in value by ordinary wear during the period the materials to be supplied have formed part of the building. Mr. Woods thinks, that in hardly any case could the landlord require more than three-fourths of the new value, and none would occur in which one-fourth ought not fairly to be demanded.*

21. On a covenant to repair, the covenantor is Accidents. bound to repair at all events, and is not excused from repairing defects caused by inevitable accident. An inevitable accident does not render it impossible to perform the covenant. The covenant is performed by repairing the consequences of the

* Woods' Essay.

accident. Where the law infers from circumstances such obligation as is reasonable, there it limits the obligation with those qualifications and exceptions, which under the circumstances are reasonable. It presumes that contract to have been entered into which is just and equal to both parties. But where the parties have themselves expressed the contract which they conceive to be just, there all the law has to do is to apply it to their acts and enforce its performance; for although it may, with much probability, be conjectured that a certain contingency was not foreseen, yet it might have been foreseen, and nothing said about it, because not intended to be excepted from the generality of the obligation. For these reasons, where there is a general covenant to repair, and the buildings are destroyed by accidental fire, the lessee is bound to rebuild.^a It is no answer to a covenant to repair a bridge, that it was destroyed by an extraordinary flood, such as the covenantor could not resist, and without default on his part.^b But when a house is destroyed by inevitable accident, the lessee performs his covenant to repair if he rebuild it within a reasonable time;^c the covenant to repair not meaning that the house shall never be out of repair, but that the lessee will restore all dilapidations which happen during the term. Although where to an action on a covenant to repair, the defendant pleaded that

^a *Compton v. Allen*, Style, 162. *Earl of Chesterfield v. Duke of Bolton*, Com. 626. *Bullock v. Dommitt*, 6 D and E. 650.

^b *The Company of Brecknock Navigation v. Pritchard*, 6 D. and E. 750.

^c *Dyer*, 33 a, pl. 10. *Walton v. Waterhouse*, 2 Saund. 420. 3 Keb. 40. 1 Vent. 38. 2 Keb. 535.

the house was burned down, and the plaintiff entered the next day, the Court held the plea to be bad, and inclined to think that there was a cause of action on the covenant directly the house was burned. It was remarked by the plaintiff's counsel, that the plea did not show that the fire was by lightning or other unavoidable cause, and therefore it ought to be intended as arising from the tenant's negligence.^a

The general obligation of the covenant to repair is not limited by a covenant to insure in a specific sum. If such sum be insufficient to rebuild the premises, he must supply the deficiency.^b

Independence
of Covenants
to repair and
insure.

If the dilapidations are caused by the act or neglect of the landlord himself, or if he renders it impossible for the tenant to perform the covenant, the breach of covenant is excused. Thus, where a tenant covenanted to repair, and leave in as good plight as he found, and it appeared that sparks of fire came from the chimney of the lessor, by which the house of the lessee was burned, it was held that the performance of the covenant was excused, because the destruction was caused by the act of the lessor himself.^c

Excuse from
Performance
by Act of
Lessor.

But an act of the lessor which merely impedes but does not wholly prevent the lessee from performing his covenant, cannot be alleged by him as an excuse for a breach. In an action for non-performance of a covenant to drain land by a certain day, the tenant pleaded that before the day the lessor entered and continued in possession until

^a Poole v. Archer. 2 Show. 401. Skin. 410.

^b Digby v. Atkinson, 4 Camp. 275.

^c T. 12 Jac. 1 Rol. Abr. 454, pl. 8.

after the day. It was held to be no plea, because it did not show that the lessor held him out and disturbed him to do it.^a In an action of covenant for not repairing, the defendant pleaded that the plaintiff entered into the back yard of the premises. The Court held that the entry into the back yard did not suspend the covenant to repair, as the defendant was still in possession of the messuage.^b

And so it is no answer to an action on a covenant for not repairing and cultivating, that the plaintiff entered on parcel of the demised premises, and ejected the defendant therefrom.^c

By Licence of
Lessor.

And a covenant cannot be discharged by a parol licence of the covenantee. If the landlord, by word of mouth, or writing (not being a deed), authorize the lessee to do an act which is a breach of covenant, the lessee is liable to an action of covenant notwithstanding. Thus, where the lessee covenanted to yield up all erections and improvements erected during the term, and applied to the lessor to know if he would permit him to remove a green-house which he was about to erect, the lessor, by letter, stated that he might remove it. He accordingly erected it, and afterwards removed it. He was held liable for a breach of covenant.^d

Independence
of Covenants
to repair and
to pay Rent.

Obligation to
pay Rent when
Premises are
burned.

And the tenant is not excused from the performance of a covenant to pay rent by the premises becoming untenable by inevitable accident, as

^a Carrell v. Read. Cro. El. 374.

^b Snelling v. Stagg and Andrews, M. 26 Car. II. C. B. B. N. P. 165.

^c Newton v. Allin, 1 Q. B. 518. 1 G. and D. 44.

^d West v. Blakeway, 2 Man. and Gran. 729.

if the house demised is burned down, or land is surrounded by water, or the tenant is evicted by a foreign enemy.^a And where the lease contains covenants to pay rent and to repair, and in the covenant to repair the case of the premises being destroyed by fire is excepted, the tenant must pay the rent accruing after the premises have been destroyed by fire, and before they are rebuilt; and he must do so although it be assumed that it is the duty of the lessor to rebuild, the covenants being distinct, and he having a sufficient remedy by action against the lessor for not rebuilding.^b It has since been decided that such an exception does not bind the landlord to rebuild.^c

At one time it was considered that a Court of Equity ought to relieve against the payment of rent in such cases. Where land demised was taken from the tenant by the King's enemies, Lord Clarendon was inclined to restrain an action for the rent.^d But in another case, where the land had been carried away by a flood, relief was refused.^e And where a lease contained a covenant to repair, with an exception of accidents by fire, and the premises had been burned down, and the landlord had insured them, and received the insurance money, Lord Northington, who held that the lessor was

Relief in
Equity against
Payment of
Rent when
Premises are
burned.

^a *Paradine v. Jane*, Aley 26. Style, 47.

^b *March v. Cooper*, 2 Lord Ray, 1477. 2 Str. 765. *Weigall v. Waters*, 6 D. and E. 488.

^c *Belfour v. Weston*, 1 D. and E. 310, and *Ainslie v. Rutter*, cited by Buller, J., 1 D. and E. 312.

^d *Harrison v. Lord North*, 1 Chan. Cases, 83.

^e *Carter v. Cummins*, cited *ibid*.

not, by reason of the exception, bound to repair, was disposed to restrain an action for the rent until the house was rebuilt.^a

But in *Waters v. Weigall*,^b the plaintiff held under a lease containing a similarly limited covenant to repair; and the premises having been destroyed by fire, he expended an amount exceeding the rent due in repairing them, which he contended the landlord in equity ought to allow against the rent, and therefore filed a bill to restrain an action for the rent. Macdonald, C. B., dismissed the bill, holding, that if the tenant was not entitled to the allowance at law, he had no equity. And in *Hare v. Groves*,^c which was a suit to restrain an action on a covenant for rent which accrued whilst the premises were ruinous from fire, the lease contained a covenant to repair, with an exception against fire, the same learned Judge decided that the tenant was not in equity excused from payment of the rent. He considered that the fire was an injury to both parties, and that their equities were equal. He said that the decision in *Brown v. Quilter* might have proceeded on the ground that the landlord had received the value of the house from the insurance office. The decision of Macdonald, C. B., has been confirmed by Lord Eldon in a subsequent case.^d And it has since been decided that even when the landlord has insured and received the amount of

^a *Brown v. Quilter*, Amb. 619. *Camden v. Morton*, 2 Eden, 219, same Chancellor. *Steele v. Wright*, cor. Lord Apsley, 1773, cited 1 D. and E. 718.

^b 2 Anst. 575.

^c 3 Anst. 687.

^d *Holtzaffel v. Baker*, 18 Ves. jun., 115.

the insurance, the tenant has no equitable right to compel him to expend the money in restoring the premises.^a Nor is the tenant entitled to an allowance in reduction of damages for the monies so received. On the contrary, the insurers, whose contract is merely to indemnify the landlord, are entitled to be allowed the damages recovered from the tenant in reduction of their liability.^b

And when premises demised by verbal or written agreement, from year to year, or for a shorter time, are destroyed by fire, in which case the tenant is not bound to rebuild, the destruction of the building does not determine the tenancy, and the tenant still continues liable for the rent.^c And where the defendant was tenant of an upper floor of a warehouse, and a fire accidentally broke out which rendered the upper floor wholly untenable, it was held that the defendant continued liable for the rent for the period subsequent to the fire, and whilst the premises were untenable.^d

Obligation to
pay Rent when
Premises un-
tenantable in
Tenancies
without
Covenant.

It is now settled, notwithstanding some decisions to the contrary, that the tenant has no right to quit the premises because they are at the commencement of the tenancy untenable from dilapidations, which ought to have been repaired by the landlord, or become so during its continuance, unless such power is expressly reserved, and except, perhaps, in the case of a furnished house, or furnished apart-

^a Leeds v. Cheetham, 1 Sim. 146.

^b Yates v. Whyte, 4 Bing. N. C. 272.

^c Baker v. Holtzaffel, 4 Taunt. 45.

^d Izon v. Gorton, 5 Bing. N. C. 501. 7 Scott, 537. Packer v. Gibbins, 1 Q. B. 421. 1 G. and D. 10.

ments, which are taken merely for the purpose of temporary occupation. It is not a condition implied on the demise of real property, that it shall be fit for the purpose for which it is demised, or shall continue fit for such purpose. In this respect the modern and the ancient authorities agree.

To an action of debt for rent, the defendant pleaded, that by the custom of London the landlord was bound to keep the house in repair, and that before the rent accrued, it became ruinous and untenable by reason of a tempest; that the defendant requested the plaintiff to repair it, which he refused, wherefore he quitted before any rent was payable. It was held that the custom for the lessor to repair amounted to a covenant, and not a condition; the breach whereof entitled the tenant to an action, but did not avoid the lease, and therefore he still remained liable for the rent.*

In *Edwards v. Etherington*,^b the defendant was tenant, from year to year, of a house, the walls of which were so dilapidated that it became unsafe to reside in it; whereupon the defendant quitted. Lord Tenterden ruled, at *Nisi Prius*, that he was not liable for use and occupation after he had so quitted the premises; because, through no fault of his own, but through the default of the plaintiff, who ought to have taken care that the premises should have continued in such a state as to be useful to the defendant, he had had no beneficial use and occupation of the premises. The Court of King's Bench confirmed his ruling.

* 27 Hen. VI. 10. Bro. Abr. Ditto, pl. 18.

^b Ry. and Mood. 268. 7 Dow. and Ry. 117.

In *Salisbury v. Marshall*,^a the defendant, by writing, agreed to become tenant *by occupying* a house. It was understood at the time, that the plaintiff was to put the house into repair, which he had not done. Tindal, C. J., from the words '*by occupying*,' construed the agreement as importing that the house was to be properly repaired and made fit for occupation before the tenancy commenced. Upon this construction, the jury found for the defendant. The plaintiff moved to set aside the verdict, but the Court suggested a compromise, to which the parties acceded.

Collins v. Barrow^b was an action for use and occupation. The defendant held under a written agreement for three years, by which he agreed to keep the premises in tenantable repair for three years. They became unwholesome for want of sufficient drainage, and could not be kept dry without the construction of a sewer; whereupon the defendant quitted, which Bayley, J., held he was justified in doing, as he was not bound to make a sewer, and the premises had become uninhabitable without fault on his part.

Cowie v. Godwin^c was an action for the use and occupation of apartments, the wall of the privy having given way, by which the kitchens were overflowed with filth and became entirely useless, and the water of the pump was affected. The defendant quitted in consequence, and was sued for subsequent rent. Lord Denman left it to the jury

^a 4 Car. and Payne, 65. See also *Mechelen v. Wallace*, 7 A. and E. 54, n.

^b 1 Moody and Rob. 112.

^c 9 C. and P. 378.

to say whether the premises were unfit for proper and comfortable occupation, and whether the defendant quitted the apartments so soon as he could procure others. The jury found for the defendant, and a new trial for misdirection was refused.

In *Kirkman v. Jervis*,^a the defendant had hired furnished apartments with attendance for six months : at the expiration of seven weeks, in consequence of the misconduct of the plaintiff in refusing to cook some fish, he said he should quit, and quitted at the end of the eighth week. It was held, that although had he quitted immediately on the misconduct, he might have been excused from the payment of rent, yet having afterwards occupied, he was liable for the subsequent occupation.

In *Arden v. Pullen*,^b the defendant held under a written agreement of tenancy for three years, by which he agreed to keep the premises in as good condition as they then were : he quitted before the termination of his tenancy, because the house had become uninhabitable, and was in danger of falling from defects in the foundation and for want of sewerage. The Court held that he was liable to pay the rent accruing after he had so quitted, because there was no agreement by the landlord that he would do any repairs, or that the house should continue in existence during the term ; and that therefore the defendant was not obliged to quit through any default in the plaintiff.

In *Smith v. Marrable*,^c the defendant had taken a ready furnished house at Brighton for five or six weeks, which, being infested with bugs, he quitted

^a 7 Dowl. 678. ^b 10 M. and W. 321. ^c 11 M. and W. 5.

during the first week, paying a week's rent. The Court held that he was justified in so doing, and not liable to subsequent rent, on the ground that a man who lets a ready furnished house lets it on the implied condition that it is in a fit state to be inhabited.

Sutton v. Temple^a was an action for the use and occupation of pasture land and the eatage of grass there growing. It appeared that the defendant took the land for the purpose of depasturing cattle thereon, and that in consequence of some poisonous substance spread over the grass, unknown to the plaintiff, all the cattle placed there died; whereupon the defendant gave notice to the plaintiff that he gave up the land, and made no further use of it. He was held liable to the rent, on the ground that no warranty by the plaintiff, that the land was fit for any particular purpose, could be implied; Lord Abinger and Parke, B., attempting to distinguish the case from *Smith v. Marrable*, on the ground that on the letting of a ready furnished house, taken for the purpose of immediate occupation, a warranty might be implied that the house was fit for such purpose; Gurney, B., and Rolfe, B., confessing that they felt it difficult to reconcile the two cases, and the one being inclined to adhere to, and the other to overrule *Smith v. Marrable*.

Hart v. Windsor^b was an action for rent on an agreement for letting a house and garden ground, to which the defendant pleaded that the house was let for the purpose of habitation, and that, at the time of the agreement, the house was not in a fit

^a 12 M. and W. 52.

^b 12 M. and W. 68.

state for habitation, and that the defendant could not inhabit it; whereupon he quitted before the rent claimed accrued due. The Court held the plea bad after verdict, on the ground that no condition could be implied on the demise of a house let to be inhabited, that it was at the time of the demise, or should continue to be, fit for habitation, or for any other purpose: they overruled the cases of *Edwards v. Etherington*, and *Collins v. Barrow*, and said that it was not necessary to decide whether *Smith v. Marrable* was law or not, since it was distinguishable as being the case of a letting of a ready furnished house, taken for a temporary residence at a watering-place.

In *Surplice v. Farnsworth*,^a it was held that even where the landlord agreed to repair the premises, the tenant could not quit when they became untenable for want of repairs, and that he remained liable to an action for use and occupation for rent which accrued due after he had so quitted.

Covenant to improve.

22. Sometimes leases contain covenants to alter and improve: where they do, such covenants must be strictly performed. Thus, where there was a covenant to new-build the demised premises, Lord Hardwicke held, that it was not satisfied by substantial and thorough repairs. But as it appeared that they had been put in a sound state of repair, at great expense, by the lessee, he did not think it equitable to decree a specific performance of the covenant, but directed an issue to ascertain what damages the lessors had sustained by reason of the non-performance of the covenant.^b But where the

^a 7 M. and G. 576. ^b *City of London v. Nash*, 3 Atk. 512.

covenant was, within the first fifty years of the term, to take down the four demised messuages, as occasion might require, and in their place to erect four other substantial brick messuages, the Court of Common Pleas held, that if within the first fifty years the houses should be so repaired as to make them substantially as good as new houses, the covenant would be satisfied, since occasion would not require that they should be taken down.*

Again, a covenant to make a shop front is not performed by merely enlarging windows, though such enlargement be sufficient for the purposes of the tenant's trade;^b and in matters of taste, as to the style and manner in which a house is covenanted to be rebuilt, equity will enforce a specific performance; for instance, a covenant to make the elevation of a house correspond with the elevation of the adjoining houses.^c

23. Another covenant relating to dilapidations is ^{Covenant to insure.} the covenant to insure. The object of this covenant is to compel the tenant to procure a Joint Stock Insurance Company to become responsible for the repair of dilapidations by fire.

In *Doe d. Pitt v. Shewin*,^d it was objected that a covenant to insure and keep insured £800, in some sufficient office within the cities of London and Westminster, upon the buildings demised, was void for uncertainty, because it did not appear against what the insurance was to be, or in what sort of office it was to be effected. Lord Ellenborough

* *Evelyn v. Raddish*, 7 Taunt. 411.

^b *Doe d. Nash v. Birch*, 1 M and W. 402.

^c *Franklyn v. Tuton*, 5 Madd. 469.

^d 3 Campb. 134.

held, that by reasonable intendment the insurance was to be against fire, and in an office wherein policies against fire were usually effected.

The covenant to insure binds the tenant to effect an insurance directly the covenant is made. A lease containing a covenant to insure and keep insured at all times thereafter until the expiration of the term, was executed on the 12th January: the tenant effected a policy on the 18th February ensuing, which the jury found to have been effected within a reasonable time. The Court held that the jury were not warranted in coming to this conclusion in the absence of evidence accounting for the delay, and that unless there were some special circumstances rendering delay reasonable, he ought to have insured directly the lease was executed.*

The insurance must be regularly continued without intermission. In *Doe d. Pitt v. Shewin*,^b the defendant had insured the premises in the Phoenix up to 25th March, 1811, by a policy by which fifteen days beyond the quarter-day were allowed for payment of the premium, during which the Company were to be liable: the premium for 1811 was not paid until 25th April, when it was received by the Company in continuation of the policy. Lord Ellenborough held that the covenant was broken and the lease forfeited by the premises being uninsured from the 9th April to the 25th, although no loss had occurred in the interval; and he said it might admit of considerable doubt, whether, by the revenue laws, the policy could be lawfully renewed

* *Doe d. Darlington v. Ulph*, 12 *Law Times*, 424 (27 Jan. 1849).

^b 3 *Campb.* 134. (1811.)

by the payment of the premium after its expiration. He considered the fifteen days as an excrescence of the preceding year, which expired on the 25th March, and that the premises were insured during that time. In a previous case the condition of the policy was, that as long as the managers should agree to accept the premiums, they should be paid annually at the office within fifteen days after the day limited by the policy, and that no insurance should take place until the premium was actually paid. A policy was effected for a half-year; on the day after the expiration of the half-year, the premises were destroyed by fire; the insured tendered the premium within the fifteen days, which the office refused to receive. The Courts of King's Bench and Exchequer Chamber held they were not liable for the loss, because, although the condition extended to policies for a half-year, yet, when the half-year expired, it was optional on each party to continue the insurance, and there was no contract until they had both agreed to continue it.* In a subsequent case, the policy was, that the insurance should continue so long as the insured should pay the premium on the 25th December annually, and the office should agree to accept it; and by the proposals it was provided that the premium should be paid within fifteen days after the day limited, upon forfeiture of the benefit of the policy; and that no insurance should take place until the premium was paid; and that the insured should be considered as insured for fifteen days beyond the time of the ex-

* *Tarleton v. Stainforth*, 5 D. and E. 695. 1 B. and P. 471. 3 Anst. 707. (1794.)

piration of their policies. The Court construed the policy as giving the Insurance Company the option of determining the insurance by reasonable notice within the year, in which case it would expire with the year, and not be continued for fifteen days beyond; but that if they did not signify their intention of determining the insurance within the year, the insured was entitled to continue it at any time within the fifteen days for the succeeding year, so as to render them liable for a loss during the fifteen days, and before the payment of the premium.^a Where the condition of the policy is worded as in this case, the insurance continues during the fifteen days after the expiration of the year, provided the office have not, during the year, dissented from its continuance, and provided the insured pay the premium within the fifteen days.

In *Doe d. Pitt v. Laming*,^b the tenant had effected a policy, one of the conditions of which was, that it might be continued to his legal personal representative, provided an indorsement was made on it to that effect within three months after his death. He died, and the continuation of the policy to his executrix was not indorsed until more than three months after his death. Lord Ellenborough held that the policy was not discontinued, and the covenant to insure not broken; he said that the policy did not become void for want of the indorsement, but was at most voidable by the Company. He doubted the legality of the condition, because, on the death of the insured, the benefit of the policy necessarily survived to his personal representative.

^a *Salvin v. James*, 6 East, 571. (1805.) ^b 4 Campb. 73. (1814.)

The covenant to insure and keep insured means that the lessee will always keep the premises insured by one policy or another, not that he will effect a particular policy, and keep that on foot. If, therefore, there is a proviso of re-entry for breach of covenant, the forfeiture for not keeping insured is not waived by the lessor having distrained for rent, knowing that no insurance had been effected, the non-insurance after the distress being a continuing breach.^a In *Doe d. Muston v. Gladwin*,^b the Court put the same construction on a covenant to insure and *continue* insured in the joint names of the lessor and lessee.

The insurance effected must be strictly according to the covenant. Thus, where the covenant was to insure in the joint names of the tenant, his executors, administrators, and assigns, and the landlord, his executors, administrators, and assigns, and the tenant insured in his own name alone, the covenant was held to have been broken, and the lease forfeited by reason thereof.^c And so where the covenant was to insure in the name of the lessor, and the insurance was in the names of the lessor and lessee, it was held that the covenant was not performed, and that the lessee had not a good title to assign the lease.^d

By the Building Act of 14 Geo. III.,^e Insurance Offices are required, on the request of any persons

^a *Doe d. Flower v. Peck*, 1 B. and Adol. 428. (1830.)

^b 6 Q. B. 953.

^c *Doe d. Muston v. Gladwin*, 6 Q. B. 953. (1845.)

^d *Penniall v. Harborne*, 12 Jurist, 159. (1848.)

^e 14 Geo. III. c. 78, s. 83: not repealed by 7 & 8 Vict. c. 84. See Sched. A.

interested in houses or buildings destroyed or damaged by fire, to lay out the insurance money in rebuilding or repairing the premises. The Act is confined to London and Westminster and the Bills of Mortality. Upon this statute it has been held that a covenant to insure a building within the limits of the Act is a covenant which runs with the land, and is binding on the assignee of the lessee, and may be taken advantage of by the assignee of the lessor. In this case, Best, J., expressed his opinion that in every case a covenant to insure would run with the land, but the general question is not as yet decided.^a

If the lessor prevent the lessee from performing the covenant, the breach is excused, as in *Doe d. Knight v. Rowe*,^b where the lease contained a covenant to insure in the joint names of the lessor and the lessee, to two-thirds of the value of the premises. The tenant had no copy of the lease, but merely an abstract, in which it was stated that the lease contained a covenant to insure in two-thirds of the value. The tenant becoming insolvent, the landlord insured in £800. The defendant, who was assignee of the tenant under the Insolvent Act, and had no knowledge of the terms of the lease beyond what the abstract conveyed, insured in his own name in £800. On an ejectment brought for a forfeiture for non-insurance, Lord Tenterden directed the jury to find for the defendant if they

^a *Vernon v. Smith*, 5 B. and Ald. 1. In *Doe d. Flower v. Peck*, 1 B. and Ad. 428, the question was raised; but as the Court did not consider it material, it was not argued.

^b *Ry. and Moody*, 343. 2 Car. and Payne, 246. (1828.)

considered that the conduct of the landlord was such as to induce a reasonable and cautious man to suppose that he had performed the covenant by insuring in his name, and that £800 was two-thirds of the value of the premises; which they accordingly did. In *Doe d. Pittman v. Sutton*,^a the covenant was for the lessee to insure, and that if he made default, the lessor might do so, and charge him with the premiums. The lessor for some time insured, and charged the lessee with the premiums. He afterwards discontinued the insurance, and brought ejectment for the forfeiture, which Lord Denman and a jury considered he was not entitled to do, as he had by his conduct induced the tenant to believe that the premises were insured by himself.

The non-insurance of premises according to covenant is a continuing breach of covenant for so long as the premises remain uninsured; and therefore if the landlord receive rent, or distrain for it, knowing that the premises are uninsured, his conduct is only a waiver of a forfeiture with respect to past non-insurance, and does not preclude him from forfeiting the lease for non-insurance subsequent to the receipt of rent or distress.^b The receipt of rent, not knowing of the breach, appears to have been considered no waiver,^c though this may admit of doubt.

In ejectment on the ground that the lease has been forfeited by not insuring, it lies upon the land-

^a 9 C. and P. 706. (1841.)

^b *Doe d. Flower v. Peck*, 1 B. and Ad. 428. *Doe d. Muston v. Gladwin*, 6 Q. B. 953.

^c *Penniall v. Harborne*, 12 Jurist, 159.

lord to prove that the premises were not insured. The tenant refusing the landlord information as to insurance, or refusing to show a policy upon demand, is no evidence of non-insurance. In an action on the covenant it seems that the tenant would have to prove performance.^a

In an action for breach of this covenant the damages are not necessarily nominal. Where the landlord has effected an insurance on the tenant's default, though such act is not the necessary consequence of such default, and therefore the landlord is not as a matter of law entitled to recover the premiums paid, the jury may, if they please, award the amount of such premiums, by way of damages, as a sum reasonably expended to relieve himself from the anxiety incident to the premises being uninsured.^b But where the landlord was a leaseholder under a covenant to insure, and he demised to the tenant under a similar covenant, the tenant failed to insure, and the superior landlord brought ejectment, and recovered, it was held by the Court of Common Pleas that the sub-landlord was only entitled to nominal damages in an action against his tenant for breach of his covenant. He was not entitled to the value of his estate in the premises, because that had been forfeited by the breach of his own covenant, and not by the breach of the tenant's.^c

Although, in *Doe d. Pitt v. Shewin*,^d Lord Ellen-

^a *Doe d. Bridger v. Whitehead*, 8 A. and E. 571. (1838.)

^b *Hay v. Wyche*, 2 G. and D. 569. 6 Jurist, 559. 12 Law Journ. N. S. 83.

^c *Logan v. Hall*, 4 Com. Bench, 598. (1847.) ^d 3 Campb. 138.

borough suggested that the tenant might obtain relief in equity against a forfeiture for non-insurance,—and it seems that in that case the Court of Exchequer did in the first instance grant an injunction upon payment of the costs of the action,—it has since been decided, rather harshly perhaps, that equity will not relieve against the breach of this covenant.*

24. Besides the degree of care which the covenant to repair imposes, there are three other points Extent of Covenants to repair. to be attended to in the construction of such covenants: 1st, their extension to things, that is, what buildings or parts of a building a tenant is bound to repair; 2ndly, their extension to persons, or who are bound by, and who may take advantage of, a covenant of this nature; 3rdly, their extension as to time, or during what time the covenant binds the covenantor.

On the first point, a general covenant to keep As to Things. and leave in repair the premises demised will extend to every part thereof, and every thing attached thereto, which can be considered as part of the freehold, and not removeable by the lessee as a tenant's fixture. Thus, where there was a lease of three messuages, and the tenant covenanted to pull them down and erect three others in their place, and that he would during the term well and sufficiently repair all the houses *so agreed to be built*, and the said demised premises and the houses and buildings which should be thereon erected and built, and every of

* Reynolds v. Pitt, 19 Ves. 134. 2 Price, 212, n. Rolfe v. Harris, 2 Price, 206, n. White v. Warner, 2 Mer. 459. Green v. Bridger, 4 Sim. 96.

them well and sufficiently repaired at the end of the term would surrender,—the lessee pulled down the three messuages, and erected four in their place,—it was held that he was bound to leave the whole four in good repair,^a because the last covenant was general, and was the rather to be taken so, because in the first covenant to keep in repair during the term it was '*the houses agreed to be built*,' which words '*agreed to be built*' were left out in the last covenant, which the Court took to be a distinct covenant. And where the covenant was to repair the demised premises from the time of the lease to the determination thereof, during the term the lessee built a malt-house; it was held that the covenant extended to the malt-house; for, though it had no actual, it had a potential being at the time of the lease.^b

In *Pyott v. Lady St. John*,^c the covenant was to repair the houses, edifices, and buildings with necessary repairs, and at the end of the term to leave the house and other premises sufficiently repaired. It was held that the tenant was bound to keep and leave in repair the pavement of the court, because a part of the building; that it was a breach to leave the windows broken (although contended that such petty things were not within the intent of the covenant); also a breach to take away a shelf.

Generally speaking, those fixtures which a tenant fixes on the demised premises for the convenience

^a *Dowse v. Cale*, 2 Vent. 126, nom. *Douse v. Earle*, 3 Lev. 264.

^b *Brown v. Blundell*, Skin. 121.

^c *Cro. Jac.* 329. *Lady St. John v. Pyott*, 2 Bulst. 112. S. C.

of carrying on his trade, or for domestic use or ornament, he is not bound to repair, but may remove at any time during the term.

And in *Dean v. Allaley*,^a the defendant had covenanted to leave all the buildings which were or should be erected on the premises during the term in repair. He removed two sheds, called Dutch barns, which had been erected by himself during his term. Lord Kenyon held that the covenant meant that the defendant should leave all those buildings which were annexed to, and became part of, the reversionary estate, and that it did not extend to fixtures removeable under ordinary circumstances by a tenant; of which nature he considered the sheds in question.

But if he covenants to repair and leave in repair all erections and buildings to be erected and built on the demised premises, he will be bound to repair and leave in repair erections set up for the purposes of his trade which are let in and fixed to the soil, but not buildings merely supported on blocks and pattens of wood, and not let into the soil.^b A covenant to repair *improvements* has been construed to include a verandah^c and a millstone,^d which the tenant had himself erected on the premises. And where the covenant was to yield up all erections and improvements erected during the term, it was left to the jury to say, whether a green-house, erected on a frame-work built for the purpose of receiving it, was an erection or improvement; and they having

^a 3 Esp. 11.

^b *Naylor v. Collinge*, 1 Taunt. 19.

^c *Penry v. Brown*, 2 Stark. 403.

^d *Master v. Bradley*, 9 Bing. 24. 2 Moor and Scott, 25.

found that it was, it was held that the frames and sashes were within the covenant.*

In a recent case, the landlord covenanted to repair all the external parts of the premises, except the glass and lead of the windows. The covenant was held to extend to the side wall dividing the premises from the adjoining house, and which had sunk in consequence of the adjoining house being taken down. The Court said, "We think the wall in question was an external part of the premises before the Swan (the adjoining building) was taken down, but certainly afterwards. The external parts of the premises are those which form the enclosure of them, and beyond which no part of them extends. And it is immaterial whether those parts are exposed to the atmosphere, or rest upon and adjoin some other building which forms no part of the premises let."^b

The tenant is bound to leave a building erected by himself in substantial repair, although the erection was originally of defective construction.^c

Where a lessee covenanted within fifteen years to lay out £200 upon the demised premises in erecting and rebuilding messuages thereon, and the said messuages to be erected, and all other houses at any time thereafter to be erected, to repair, and the demised premises with all other houses at the end of the term to yield up, the Court of King's Bench were clear that the assignee was not bound to repair buildings erected on the premises at the time the

* *West v. Blakeway*, 2 Man. and Gran. 729.

^b *Green v. Eales*, 2 Q. B. 225.

^c *Stanley v. Twogood*, 3 Bing. N. C. 4.

lease was granted, because the intention evidently was to remove those and erect others in their place; and the lessor, not having insisted on the lessee erecting new houses within the first fifteen years of the term, could not call upon the assignee to repair the old and dilapidated buildings which he had negligently suffered to remain.^a

25. All covenants relating to the manner of using the premises during the term, as to repair houses, to cultivate lands, run with the land, and are binding not only on the lessee, but also on the assignee of his interest, though he be not expressly named.^b And such covenants affect all and each part of the land demised; and therefore, if the lessee assign his interest in part of the land, the assignee is bound by the covenants to repair and to cultivate, so far as they are applicable to the part of the land which he holds.^c And they may be taken advantage of, as well by the assignee of the reversion as by the lessor himself.^d And the assignee of the reversion of part of the premises may sue on a covenant relating to such part.^e

Extension to
Persons.

The assignee of the lessee is liable by the common law to perform the covenant. The right of the assignee of the reversion to enforce performance is founded on the stat. 32 Hen. VIII. c. 4, which only applies where the lease is by indenture; and therefore when a house is let by verbal or written

^a Lant v. Norris, 1 Bur. 287.

^b Cockson v. Cook, Cro. Jac. 125.

^c Congham v. King, 1 Rol. Abr. 522. Cro. Car. 221.

^d Sail v. Kitchingman, 10 Mod. 158.

^e Twynam v. Pickard, 2 B. and Ald. 105.

agreement, and the tenant agrees to repair, and the landlord assigns his interest, the assignee cannot sue the tenant for not repairing; and as there is an express agreement to repair with the original landlord, an agreement with the assignee to use the premises in a tenant-like manner cannot be implied.^a The original landlord, of course, may sue on the agreement, notwithstanding the assignment of his reversion.^b But in such case, if the tenancy is merely from year to year, and the tenant or his assignee continue as tenant from year to year of the lessor or his assignee, an agreement between the new parties will be implied that such renewed tenancy shall be on the old terms.^c

Notwithstanding some decisions to the contrary, it is now decided that an assignee in equity of a lease, for instance, a party who has had it deposited with him by way of equitable mortgage, is not liable on the covenants as assignee, and that the Court of Chancery will not compel him to take an assignment.^d

A covenant to do any thing upon the land, as to build a wall or a house, or which in any way affects the land, as in a lease of mines, a covenant

^a Standen v. Christmas, 10 Q. B. 135.

^b Bickford v. Parson, 12 Jurist, 377.

^c Buckworth v. Simpson, 1 C. M. and R. 834. Hutton v. Warren, 1 M. and W. 466. Millis v. Turner, 10 Law Times, 323. Q. B. H. 1848.

^d Lucas v. Comerford, 1 Ves. jun. 235. 3 Brown, C. C. 166. Flight v. Bentley, 7 Sim. 141. Close v. Wilberforce, 1 Beavan, 112. Moores v. Choat, 8 Sim. 508. Robinson v. Rosher, 1 Young, C. N. C. 7. Wilson v. Leonard, 3 Beav. 371. Moore v. Greg, 12 Jurist, 911, 952.

to build a smelting-mill,^a is a covenant which runs with the land, and the benefit thereof will pass to the assignee of the reversion. But such a covenant being to do a specific act, and not continually to be performed during the term, does not bind the assignee, if not named. Thus, if B. covenant for himself, his executors and administrators, to build a wall, the assignee is not bound, because the intention appears to be that the wall shall be built by the lessee before assignment; but if the covenant be that the lessee or his assigns shall build a wall, the assignee is bound.^b If the lessee covenant for himself and his assigns to build a house within a certain time, and assign after the expiration of the time, the assignee is not bound; but if he assign before the covenant is broken, the assignee is.^c The assignee of the reversion cannot sue for a breach of covenant before the conveyance to himself.^d

A covenant not to build is at all events, in equity, binding on the assignee, and the Court will restrain the assignee, who has notice of such covenant, from violating it.^e

26. In considering the time during which the obligation of a covenant to repair continues, it is ^{Duration of} ^{Covenant.}

^a Sampson v. Easterby, 9 B. and C. 505.

^b Spencer's case, 5 Rep. 16. 1 Smith's Leading Cases, 22.

^c Grescot v. Green, 1 Salk. 199. Holt, 177. St. Saviour's Churchwardens v. Smith, 3 Bur. 1271. 1 Black. 351.

^d Johnson v. Churchwardens of St. Peter's, Hereford, 4 A. and E. 520. 6 Nev. and Man. 107.

^e Mann v. Stephens, 15 Sim. 377. Talk v. Moxhay, 13 Jur. 26, 89.

to be seen, first, when it begins; and, secondly, when it ends.

The obligation to repair usually commences at the date of the lease, or at the commencement of the term when the term commences subsequent to the date of the lease. But when the habendum is from a day prior to the date of the lease, the covenant binds from the date of the lease.^a

Sometimes the obligation to repair is postponed until some event has happened, or act amounting to a condition precedent has been performed. Thus in *Lant v. Norris*,^b the covenant to repair did not operate until the premises were rebuilt.

And where the lessee covenanted that after the lessor had repaired the houses he would keep them in repair, it appeared that at the time of the demise some of the houses were ruinous, and some in good repair, and that the lessor repaired the ruinous houses, but did nothing to the others; and that a dove-house, which at the time of the demise was in good condition, and therefore not repaired by the lessor, was suffered by the lessee to become dilapidated, and then pulled down by him; it was held not to be within the lessee's covenant, because the lessor had not repaired, and that his remedy was by action of waste. Although it was in good repair when the lease was granted, yet when it afterwards fell into decay, the lessor should have repaired it, and then the lessee would have been bound thereto.^c

And where the covenant was that the tenant would expend £100 in substantial and beneficial

^a *Shaw v. Kay*, 1 Excheq. 412. ^b 1 Bur. 287, ante, 189.

^c *Slater v. Stone*. 2 Rol. Rep. 248. Cro. Jac. 645.

improvements and additions to the dwelling-house, and in substantial and permanent repairs thereof, under the direction and with the approbation of a competent surveyor, to be named by the landlord; it was held that the appointment of a surveyor by the landlord was a condition precedent to the obligation of the tenant to do the repairs.^a

But where the plaintiff covenanted to grant the defendant a lease of copyhold premises for twenty-one years, from 25th March, 1820, so soon as a licence could be obtained from the lord of the manor, and the defendant covenanted *from thenceforth*, from time to time during the term to be granted, to keep the premises in repair; and the defendant entered into possession, but no licence was obtained or lease granted; it was held that he was bound by his covenant to repair, the intention being apparent that he should occupy and repair before the licence was obtained or lease granted.^b

In another case,^c where the tenant covenanted to repair at all times, when, where, and as often as occasion required, and at furthest within three months after notice, it was held a conditional covenant, and that the tenant was not bound to repair until notice given. But where by one covenant it is stipulated that the tenant shall repair generally, and in another that he shall repair within a certain time after notice, the covenants are independent, and the tenant is bound to repair, although no notice is given.^d

^a Coombe v. Green, 11 M. and W. 480.

^b Pistor v. Cater, 9 M. and W. 315.

^c Horsfall v. Testar, 7 Taunt. 385. 1 Moore, 89.

^d Wood v. Day, 7 Taunt. 646. 1 Moore, 389. Roe d. Goatly

Although a covenant to repair generally, and a covenant to repair after notice, are distinct, they will be construed, if possible, as extending to the same sort of repair: thus, where in the general covenant there was an exception of reasonable use and wear, and the covenant to repair after notice did not mention the exception in express terms, but came after the general covenant, and provided that in case of any defects or wants of repair *as aforesaid*, notice might be given, and the tenant should repair, it was considered as virtually including the exception of reasonable use and wear.^a

A covenant to leave in repair at the end, or other sooner determination of the term, applies when the term is determined by notice, according to a power reserved to the lessee.^b

When a lease is conditioned, that if the lessee does not repair within six months after notice, the lessor may re-enter, the notice to repair must be given to the lessee or his assignee. A notice to repair given to an under-lessee will not suffice. There is a difference between a condition for payment of rent and a condition to repair: the latter being collateral to the land, and merely personal, a demand need not be made on the land. There is also a difference where the time for doing the thing is certain, as the payment of rent, and where it is uncertain: in the one case it suffices to make a demand on the land, in the other it must be on the person.^c

v. Paine, 2 Campb. 520. Doe d. Morecraft v. Meux, 4 B. and C. 606. ^a Wright v. Goddard, 8 A. and E. 149.

^b Wright v. Goddard, *ib.*

^c Swetman, or Stweton, v. Cush, Yelv. 36. Cro. Jac. 9. Owen, 114, nom. Streetman v. Eversley.

A general covenant to repair is not only obligatory during the continuance of the lease, but also, where the lessee continues tenant after its determination, it will be presumed that he holds under the same terms. Thus where a tenant covenanted to repair, and, after his term had expired, continued to occupy the premises, and they were burned down, it was held, that by the terms of the covenant he was bound to rebuild.^a The continuance of special covenants for the cultivation of lands will not be implied from the mere fact of holding over, though they may be so where the rent is paid in the same manner as under the expired lease, since that is evidence of the tenancy continuing under the same conditions.^b But where there was a covenant to yield up the premises in good repair at the end of the term, and a covenant not to convert or alter the premises, but to deliver them up in the same state as when the lease was granted, and it appeared that the buildings were altered during the term, and were dilapidated at the end of the term, the tenants held over, but no dilapidations happened during the continuance of the yearly tenancy, it was held that the tenants were not liable on the implied agreement for those alterations and dilapidations, because they were breaches of the covenants in the lease, which the continued tenancy did not impose the duty of re-

^a *Digby v. Atkinson*, 4 Campb. 275. *Buckworth v. Simpson*, 1 C. M. and R. 834. *Beale v. Sanders*, 3 Bing. N. C. 860. 5 Scott, 580.

^b *Kimpton v. Eve*, 6 Ves. 328. *Boraston v. Green*, 16 East, 71. *Hutton v. Warren*, 1 M. and W. 466.

pairing.^a Those covenants alone are implied as continuing in force which regulate the manner in which the tenements shall continue to be used.

Form of Covenant.

27. There are no particular formalities requisite to give validity to an agreement to repair, as that it should be contained in a valid lease of the premises. An agreement in writing by which the tenant agreed to take the premises for three years, and to repair, and under which he was let into possession, bound him to do the repairs agreed for, although there was no written lease for three years, signed by the lessor, and the tenant held only at will until he paid rent, and afterwards as tenant from year to year.^b And where the defendants held as assignees of a void lease, containing a covenant to repair, they were considered as holding under an agreement similar to the covenant, for so long time as the term assumed to be granted by the lease continued.^c

Waste in Gardens.

28. Waste may be committed in a garden or orchard.^d Thus it is waste to cut down apple-trees or pear-trees growing in a garden or orchard;^e but not if they grow scatteringly on divers places of the land.^f When apple-trees are blown down, the tenant may take them; but where such trees were abated by a great wind, and fell upon the crops, and several of the boughs fell into the ground, and

^a Johnson v. Churchwardens of St. Peter's, Hereford, 6 N. and M. 107. 4 Ad. and El. 520.

^b Richardson v. Gifford, 1 Ad. and El. 52. 3 N. and M. 325. Doe d. Thomson v. Amey, 12 A. and E. 476.

^c Beale v. Sanders, 3 Bing. N. C. 860. 5 Scott, 58.

^d 44 Ed. III. 44.

^e 7 Hen. VI. 38.

^f Bro. Abr. Waste, pl. 143.

the trees bore fruit two years afterwards, it was held waste for the lessee to grub them up.^a

A gardener who cultivates trees for their fruit has no right to remove them; but a nurseryman who rears them to sell and transplant has a right to remove.^b

Nor can the tenant of a pleasure garden remove trees, ornamental hedges, or shrubs, or a border of box, although planted by himself, such things being intended to be permanent;^c nor can he plough up a strawberry-bed before it is exhausted.^d

There is no authority for saying that a tenant is under any positive obligation to cultivate a garden or orchard:^e the cases only establish a negative obligation against voluntary waste. The tenant is entitled to cultivate and to remove or transplant any plants in the fair course of cultivation, but not to remove things merely for his own benefit, unless the purpose for which the garden was let authorizes him to do so, as in the case of a nurseryman; nor can he alter the character of the garden, or any part of it, as by ploughing up a strawberry-bed and sowing turnips.^f

29. It is waste permanently to alter the character of land, though its value may be increased, such as to convert meadow into arable land by ploughing it

Waste in
Lands; Alter-
ation.

^a 44 Edw. III. 44 b. 7 Hen. VI. 38.

^b Wyndham v. Way, 4 Taunt. 316. Wardell v. Usher, 3 Scott, N. R. 508.

^c Empson v. Soden, 4 Barn. and Ad. 655. Johnstone v. Symons, 9 Law Times, 545.

^d Wetherell v. Howells, 1 Campb. 227.

^e See Johnstone v. Symons, 9 Law Times, 545, post, s. 31.

up,^a or arable land into wood, or a meadow into an orchard, because it not only changes the course of husbandry, but affects the proof of title.^b But it seems that if a meadow is ploughed for the purpose of improving it as a meadow, and not of permanently altering its character, as where by the custom of the country it is good husbandry to do so, it is not waste to plough it:^c and so it seems the tenant may root up bushes, furze, and thorns growing on the land, for melioration; for that is good husbandry, and he is entitled to such things for fuel.^d And on the same principle, to divide a great meadow into many parcels, by making of ditches, was said not to be waste, because the meadow might be the better for it:^e and in this case Wyndham and Rhodes, Justices, held that to convert a meadow into a hop-garden was not waste, because it was employed to a greater profit, and might be a meadow again; but Perriam, Justice, appeared to entertain a different opinion, saying, that although it was to a greater profit, it was also with greater labour and charges; and the conversion of a meadow into an orchard is waste, although it may be to the greater profit of the occupier.^f The rule appears to be, that a permanent alteration of land, which necessarily affects the evidence of title, or any alterations which di-

^a *Simmons v. Norton*, 7 Bing. 640.

^b Co. Lit. 53 b. Per Knightley, *Maleverer v. Spinke*, Dyer, 37 a. Lord Darcy v. Askwith, Hob. 234.

^c 1 Rol. Abr. 814, pl. 5. *Simmons v. Norton*, 7 Bing. 640.

^d *Maleverer v. Spinke*, Dyer, 37 a.

^e *Allman's case*, Dyer, 361 b. 2 Rol. Abr. 820. *Tresham v. Lamb*, 2 Brownl. 46; 2 Rol. Abr. 814.

^f 2 Leon, 174, pl. 210. T. 29 Eliz.

minish the value of the land, is waste; but a mere temporary alteration in the ordinary and reasonable course of husbandry is not: and by reason of the injury to the evidence of title, it is waste to enclose and cultivate waste land.^a

It is waste if the tenant take away the substance of the land, as if he dig and take away clay, because the soil is impoverished for want of clay;^b and he cannot open mines, quarries, or clay-pits: but if ^{Mines.} mines, quarries, or clay-pits are open, and in work, when the estate for life or years is created, the tenant may continue to work them; because an intention that he may do so may be presumed;^c but it seems that a tenant for life has no right to re-open and work clay-pits which the grantor had ceased to work before the creation of the estate.^d A tenant has no right to minerals deposited on the land by mountain streams.^e

As a tenant is entitled to work mines open at the time the lease is granted, so he may use all means necessary for working them, and therefore may open new shafts and pits to follow the same vein of coal. "Otherwise," said Lord Chancellor King, "working in the same mine would be impracticable, because the miners would be choked for want of air, if new holes were not continually opened to let the air into them; and the same vein of coal frequently

^a *Queens' College v. Hallet*, 14 East, 489.

^b 22 Hen. VI. 18. B. pl. 34; Bro. Abr. Waste, pl. 93. *Manwood's case*, Moore, 101.

^c Co. Lit. 54 b. *Ferrand v. Wilson*, 4 Hare, 388.

^d *Viner v. Vaughan*, 2 Beav. 446.

^e *Thomas v. Jones*, 1 You. and Col. N. C. 510.

runs a great way, and is very knowable, and easy to be discerned.”^a

The Court of Chancery will restrain a tenant for life or years from sowing woad^b or mustard,^c they being poisonous and exhausting plants, by which the vegetative power of the land is destroyed.

Fences.

30. A tenant is bound to keep the fences in repair, and he may cut timber for this purpose; but he has no right to make fences where none were before.^d And it would appear that he is not liable if the fences become dilapidated from natural decay, and there is no wood on the premises with which he can repair them.^e

Obligation to cultivate Lands.

31. By the general law, a tenant for life or for years is under no obligation to cultivate lands. Thus it is not waste to suffer arable land to lie fresh and not manured, so that it grows full of thorns; it is merely ill husbandry.^f To oblige a tenant to farm according to good husbandry, there must either be an express contract or a custom of the country.^g In most, if not all cases in which lands have been usually let to farmers, there is a custom of the country regulating the manner in which the lands are to be cultivated.

^a Clavering v. Clavering, 2 P. Wms. 388.

^b Marquis of Powis v. Dorall, Bac. Abr. Waste, M. See also Tresham v. Lamb, 2 Brownl. 46.

^c Pratt v. Brett, 2 Mad. 62.

^d Co. Lit. 53 a; 53 b. Manwood v. Myne, Dyer, 332.

^e Whitfield v. Weedon, 2 Chit. 685.

^f 2 Hen. VI. 10 b. Bro. Abr. Waste, pl. 5. 2 Rol. Abr. 814. F. N. B. 59 M. (136): per Parke, B., Hutton v. Warren, 1 M. and W. 472: per Lord Abinger, Halifax v. Chambers, 4 M. and W. 663. ^g Per Parke, B., Hutton v. Warren.

A custom of the country need not have existed from time immemorial, as must a custom properly so called. It is the approved habits of good husbandry practised in that part of the country in which the lands are situate, and is a means of ascertaining the course of cultivation adapted to the nature of the lands. It may be proved by covenants usually inserted in farming leases, and need not be definite and precise. Thus in an action for not properly cultivating lands in Cheshire, it was proved that in that part of the country where the soil was cold, as was the defendant's, not more than one-third was kept in tillage; and where the soil was warm, not above one-fourth; and it appeared that the defendant had tilled one-half his land; the Court considered that a custom was established not to keep one-half the land in tillage at once.^a

The obligation to cultivate lands in a husband-like manner, and according to the custom of the country, results from the mere relation of landlord and tenant of farm-lands; and, according to *Powley v. Walker*, there is also an obligation not to carry away any of the straw, dung, or compost, but to consume them in manuring the demised premises.^b But in *Gough v. Howard*,^c *Lawrence, J.*, held, that according to the common course of husbandry, unless there was some custom to the contrary, the

^a *Legh v. Hewitt*, 4 East, 154. T. 1803. See also per *Parke, B.*, *Angerstein v. Handson*, 1 C. M. and R. 796.

^b *Powley v. Walker*, 5 D. and E. 373. M. 1793. *Brown v. Crump*, 1 Marsh, 569. Dictum of *Gibbs, C. J.*

^c *Peake's Add. Cases*, 169. *Salop Sum. Ass.* 1801.

tenant might remove straw, but not manure made on the premises. According to the rule stated by Parke, B., in *Hutton v. Warren*, the obligation to expend manure, and right to remove, must in every case, where there is no express contract, be governed by the custom of the country. There is no rule of law on the subject, irrespective of such custom: farmers are more fit than lawyers to decide such a question.

The obligation to cultivate lands according to the custom of the country does not apply to a garden or to a meadow let with a gentleman's residence.^a

Where there is a special agreement as to the manner in which the lands shall be cultivated, the obligation to cultivate according to the custom of the country is superseded, as where the tenant agreed to farm the land in a good and husbandlike manner, to be kept constantly in grass;^b and where the landlord recovers damages for the conversion of a meadow into arable land, he cannot also recover for removing the straw grown on such land,—a contrary to the custom of the country as to the cultivation of arable land.^c

The following cases illustrate the principle, that contracts must be construed according to the expressed intention of the parties in its application to contracts of this description.

A tenant covenanted well and sufficiently to muck and manure a field with two sufficient sets of

^a *Johnstone v. Symons*, 9 *Law Times*, 535: cor. Patteson, J., *Buckingham Summer Assizes*, 1847.

^b *Saunderson v. Griffith*, 5 B. and C. 909. T. 1826.

^c *Johnstone v. Symons*.

muck within the last six years of the term, the last set to be laid within three years of the expiration of the term. It was held that the tenant was at liberty to lay both sets of manure within the last three years, the intent being that the landlord should have the land at the end of the term well manured. The ruling might have been different if it had been shown that it was contrary to good husbandry so to manure the premises, because in such case the premises would not have been twice well and sufficiently manured.^a

A covenant not to sow with more than two successive crops of grain during four years of the term was held to apply to any four years of the term, however taken, and not to each successive four years from the commencement.^b

A bond was conditioned that the tenant should not cart away any manure from the farm; it was held to be confined to manure produced on the farm, but that manure dropped by cattle belonging to a third person, stabled on the farm, but not fed on the produce of the farm, was manure produced on the farm, which the tenant was prohibited from removing.^c

A covenant to convert into manure and spend on the premises all the hay growing on the premises, but in case the tenant should take away any part thereof, which he should be at liberty to do, he should for every ton taken away bring on the premises another ton of manure, is an alternative

^a Pownall v. Moores, 5 B. and Ald. 416. H. 1822.

^b Fleming v. Snook, 5 Beavan, 55.

^c Hindle v. Pollitt, 6 M. and W. 529. E. 1840.

covenant, the intent being that the farm shall have the same benefit as if all the manure had been spent thereon; and therefore, in pleading such a covenant, the whole must be set forth, and the breach laid in the alternative.^a

Obligation as
to Live Stock,
Doves, &c.

32. If tenant of a park, vivary, warren, or dove-house, destroy so many of the deer, game, rabbits, or doves, that sufficient be not left for store, having regard to the number at the time his estate was created, it is waste. To stop the holes of a pigeon-house, so as to prevent the pigeons building there, is waste. If the tenant of a park permit the pales to decay, so that the deer escape, he is liable for waste.^b Breaking a wear, or suffering the banks of a fish-pond to decay, so that the water and fish run out, are respectively acts of waste. But the subversion of coney-burrows has been held not to be waste. "It is usual," said Walmsley, J., "to have waste against those who make holes in land, not against those who stop them up."^c And it was in former times waste, if a party caused the exile or emigration of villeins by talliage or oppression.^d

Right to Em-
blements, of
what Things.

33. The consideration of the duty of tenants as to the cultivation of lands naturally leads to the subject of their right to emblements, to an away-going crop, and to a compensation for tillage: the first is a right given by the common law, the other is conferred either by special custom, or the contract of the parties.

^a Richards v. Bluck, 12 Jurist, 963. C. P. M. 1848.

^b Co. Lit. 53 a. Hob. 296.

^c Moyle v. Mayle, Owen, 66. Bathurst v. Burded, 2 Br. 64.

^d 2 Inst. 304.

Emblements are the products of the earth, which a tenant, the determination of whose estate is sudden and fortuitous, is allowed to take after his interest in the land has expired, in consideration of his labour and manurance employed upon the land: "lest the ground should be unmanured, which would be hurtful to the commonwealth, he shall reap the crop which he sowed in peace." The doctrine of emblements applies to all those crops or roots which require annually to be renewed, and which yield an annual artificial profit: thus wheat, and every description of grain, hemp, flax, saffron, carrots, turnips, potatoes, melons, are subjects of emblements;^a but of those things which the earth spontaneously produces, though they may be rendered more abundant by the labour of the tenant, such as grass,^b and of those which do not require an annual renewal, as the fruit of trees, a party is not entitled to emblements. Thus clover, the roots of which bear several crops, and continue productive longer than a year, cannot be claimed as emblements; at any rate, the tenant can only take the crop immediately succeeding the determination of his estate.^c But hops, although growing from ancient roots, yet as every annual crop requires great manurance and labour to bring it to perfection, in making hills and setting poles, are claimable as emblements.^d

34. As by the common law those only were ^{By what Tenants.} liable for waste whose estates the law created, and

^a Co. Lit. 55 b.

^b Co. Lit. 56 a.

^c Graves v. Weld, 5 B. and Ad. 105.

^d Latham v. Atwood, Cro. Car. 515.

whom, therefore, it was not in the power of any person to bind by express conditions, so those alone are entitled to emblements whose estate determines at a time which cannot be foreseen and provided against. A lessee for years may fix the time at which his term shall cease; and if he do not fix it at a time after the harvest is gathered, an intention may be inferred that the lessor shall have the crops growing at the determination of the lease. Tenants for life and at will, the tenant for the life of another, and the lessee of tenant for life (when his estate determines by the death or forfeiture of his lessor), are entitled to emblements;^a and not only those whose interest in the land ceases with their life, but those whose interest in the land survives to their heir, as tenants in fee and in tail have the right to emblements, and may leave them, as part of their personal estate, to their executors.^b

Emblements are given as a compensation for the labour of the tenant in tilling the ground; and therefore, if a tenant for life, after sowing, lease the land, and die before the crop is reaped, the lessee is not entitled to emblements.^c No right to emblements can attach before the land is actually sown; therefore, where the estate of a tenant is determined by the lessor before sowing, he is not entitled to the expense of ploughing and manuring.^d

Determination
of Estate ne-
cessary to con-
fer such Right.

35. There is a right to emblements when the estate is suddenly determined by the act of God, as by death, or by act of the law, as if a lease be made to husband and wife during coverture, and they are

^a 2 Black. Com. 122.

^b Com. Dig. Biens, G. 2.

^c Anon. Cro. El. 61.

^d Co. Lit. 55 a, n. 4.

divorced à vinculo matrimonii, the husband may take the emblements;^a or by act of the lessor, as where an estate at will is determined by the entry of the landlord;^b and where a lease contained a condition, that if the lessee should be declared a bankrupt, or should become insolvent, or should incur any debt upon which judgment should be signed and execution issued, the lessor might re-enter, the re-entry under this condition being the act of the lessor, the lessee was held entitled to emblements.^c

Where the estate is determined by the act of the tenant, as if tenant at will determine his own will,^d or if a woman who holds land during widowhood, marry,^e there is no right to emblements; but in such case, if at the time the estate is so forfeited the land is in lease, the lessee is entitled to emblements, because the incipient right to the corn is in him, and his estate is determined by an act over which he has no control.^f Where a forfeiture of tenant for life is not taken advantage of by him in remainder, and he is allowed to continue in possession until his death, the remainderman cannot then insist on the act of forfeiture as depriving him of his right to emblements.^g

36. Where there is a right to emblements, the party entitled to them has free entry, egress and ^{Incidental Rights.}

^a Shep. Touch. 244.

^b Lit. s. 68.

^c Davis v. Eyton, 7 Bing. 154. 4 M. and P. 820.

^d Eaton v. Southby, Willes, 136.

^e Co. Lit. 55 b.

^f Knevitt v. Pool, Cro. El. 463.

^g Johns v. Whitby, 3 Wils. 127.

regress, for the purpose of reaping and carrying away the crop.^a

Right to an
away-going
Crop and for
Tillage.

37. By the common law, a tenant for years, whose term ends at a certain time, is bound, at the expiration, to yield up his farm with the crops and every thing growing thereon. If there is a contract or custom to the contrary, it must be proved by the tenant.^b The property in and right to possess the growing crops immediately vests in the landlord, and he may maintain trover for them if the tenant reaps them after the expiration of his term, and before he quits.^c

But as by custom of the country the tenant may be bound to cultivate farm-lands, so by a similar custom he may be entitled to the whole or part of the crop sown by him during the last year of his tenancy, and to a compensation for seed and labour in preparing the land for the in-coming tenant; and such a custom prevails though he holds under a lease or agreement in writing, expressing the terms of his holding. This is an exception to the rule, that where the contract is expressed in writing, it cannot be varied or extended by parol evidence; it being presumed that in this, as well as some other transactions, the parties did not intend to express in writing the whole of their contract, but agreed with reference to the known usage.^d

The earliest case in which such an usage pre-

^a Lit. s. 68. Co. Lit. 56 a.

^b Per Parke, B., *Caldecott v. Smythies*, 7 Car. and Payne, 809.

^c *Davis v. Connop*, 1 Price. E. 1814.

^d Per Parke, B., *Hutton v. Warren*, 1 M. and W. 475.

vailed is *Wigglesworth v. Dallison*,^a in which the plaintiff, who held, under a lease for twenty-one years, a farm at Hibaldstow in Lincolnshire, claimed by immemorial custom of the parish of Hibaldstow, to reap and carry away, when ripe, all the corn which had been sown by him before the expiration of his term, on any part of the lands not exceeding a reasonable quantity, according to the usage of husbandry. The Court upheld the custom; Lord Mansfield saying, "It is just: for he who sows ought to reap; and it is for the benefit and encouragement of agriculture. The lease being by deed does not vary the case. The custom does not alter or contradict the agreement in the lease: it only superadds a right which is consequential to the taking."

In a former case,^b *Yates, J.*, had held that such a custom could not legally extend to lessees by deed, though it might prevail by implication in cases of parol agreements.

It has also been decided that a custom, that a tenant shall be compensated by his landlord for seed and labour bestowed by him in cultivating the land during the last year of his tenancy, in case he did not receive an equivalent at his entry, is a reasonable custom; and that the tenant may maintain an action against his landlord for the compensation due to him by such custom.^c

^a 1 Doug. 201. 1 Smith's Leading Cases, 299. T. 19 Geo. III. Affirmed in the Exchequer Chamber, T. 21 Geo. III.

^b *Trumper v. Carwardine*, Herefordshire Summer Assizes, 1769. Cited 1 Doug. 202.

^c *Dalby v. Hirst*, 1 B. and B. 224. 3 Moor, 536. E. 1819.

Where such a custom prevails, it applies to all cases, unless the agreement of tenancy is inconsistent with it. And whether the agreement of tenancy is or is not inconsistent with the custom is usually the question in dispute.

Senior v. Armitage^a was an action by tenant against landlord for compensation for half tillage, crops sown, and away-going crops, founded on the custom of the country. The agreement of tenancy was, that all manure, compost, &c., was to be used on the farm, and left on the land at the expiration of the holding, without the defendant claiming any compensation therefore. This was held not to exclude the custom by implication.

In *Holding v. Pigott*^b the plaintiff claimed an away-going crop. The defendant resisted the claim, because, by the lease, the plaintiff was bound to summer-fallow the ground on which the crop had been sown. The Court held that the plaintiff was entitled to the crop, because the lease related to the terms of holding and not to the terms of quitting, and because the custom and lease were both affirmative, and might therefore well co-exist; that although the tenant might be liable to the landlord for breach of covenant in sowing his corn on the land which he was bound to keep fallow, he did not thereby lose his property in the crop.

In *Hutton v. Warren*,^c the custom was that the tenant should, on quitting, receive a compensation

^a Holt, N. P. C. 197, York Lent Ass. 1816. See Bayley, J's., observation on this case in *Webb v. Plummer*, 2 B. and Ald. 751, and Parke, B., in *Hutton v. Warren*, 1 M. & W. 476.

^b 7 Bing. 465. 5 Moor and Payne, 427. E. 1831.

^c 1 M. and W. 466. E. 1836.

for seed and labour. The lease provided that he should consume on the premises three-fourths of the hay and straw produced thereon, and from certain tithes also demised, and should at the end of the term leave such as should not be spread, for the use of the landlord, on being paid the reasonable price thereof. The lease was held not to exclude the custom, because the one related to tillage and sowing, the other to manure.

In *Wilkins v. Wood*^a it was determined that a custom for tillage and improvements was applicable where there was a written agreement not inconsistent with the custom, although there was no evidence of the custom ever having prevailed in the case of a written agreement.

In *Webb v. Plummer*^b an out-going tenant was by custom entitled to be paid for foldage. The lease provided for certain payments to be made to the tenant on quitting, but was silent as to foldage. The Court held the custom excluded, considering that the lease defined the rights of the parties on quitting; Bayley, J., saying, "If the lease is entirely silent as to the terms of quitting, the custom applies; but if it specifies certain terms of quitting, they must be taken to be all the terms."

In *Roberts v. Barker*,^c the custom was to leave the manure, and to be paid for it by the landlord. The lease contained a covenant not to remove manure, but to leave it to be expended by the landlord or in-coming tenant. The custom which implied a right to the manure was held excluded.

^a 12 Jurist, 583. Q. B. T. 1848.

^b 2 B. and Ald. 746. T. 1819. ^c 1 C and M. 808. T. 1833.

The lease and custom were also held inconsistent in a case where the custom was for the tenant to pay for manure on entering, and receive payment for it on quitting; and the agreement recited that the close had been manured, and the tenant agreed to leave it in the same state, or pay for its deterioration.^a

The tenant does not lose his right to an away-going crop by the non-performance of a collateral condition not going to the whole consideration for the right; as where by his lease he had liberty to fence in, take care of and preserve, reap and take away, all the corn sown by him during the last year of his tenancy, so as the same exceeded not 29 acres, and was summer fallowed and well manured: the breach of these conditions did not deprive him of his property in the crop growing on 29 acres, but merely gave the landlord a right of action against him.^b But where the tenant agreed to pay for tillages, and hold for fourteen years, and the landlord agreed to pay him for tillages at the end of the term; the tenant failed to pay for the tillages, and quitted at the end of the first year, leaving tillages of greater value than those for which he was bound to pay the landlord; the Court held that he was not entitled to be paid for the tillages, because he did not quit according to the agreement, but in effect ran away.^c

The custom of Herefordshire was for the outgoing tenant to sow one-third of the tillage land, called his 'odd-mark,' and to keep possession of the

^a *Clarke v. Roystone*, 13 M. and W. 752. H. 1845.

^b *Boraston v. Green*, 16 East, 71. T. 1812.

^c *Whittaker v. Barker*, 1 C. and M. 113. M. 1832.

whole of the tillage land until the harvest, when he took the crop of the one-third, and the in-coming tenant had the excess, allowing the out-going tenant the expense of ploughing, sowing, and seed. Parke, B., held that if the out-going tenant sowed a whole field beyond one-third, he was not entitled to keep possession of such field, there being no distinct evidence that the custom extended so far.^a

Where the landlord licensed the tenant to sow more than his odd-mark, he was held entitled to the excess, both against the landlord and the in-coming tenant.^b

Where the out-going tenant is entitled to an away-going crop, either by custom or agreement, he has the property in, and right of possession of, the crop,^c and the right of possession of the land on which it is growing, and of the barn in which it is housed, if he is entitled to house in barns. His term is prolonged as to that part of the premises which he is thus entitled to possess, and he may maintain trespass against the landlord, or any other person, if they enter the part so in his possession;^d and the landlord may distrain on his away-going crop.^e And where the out-going tenant covenanted to leave the manure on the premises, and to sell it to the in-coming tenant at a valuation,

^a Caldecott v. Smythies, 7 C. and P. 808. Hereford Lent Ass. 1837.

^b Griffiths v. Tombs, 7 C. and P. 810. Hereford Lent Ass. 1833.

^c Grantham v. Hawley, Hob. 132.

^d Wigglesworth v. Dallison, 1 Doug. 201. Boraston v. Green, 16 East, 71. Griffiths v. Puleston, 13 M. and W. 358.

^e Lewis v. Harris, 1 H. Bl. 7, n. Beavan v. Delahay, 1 H. Bl. 5.

the right of possession of the manure was in him until payment, and he recovered in trespass against the in-coming tenant for taking it.^a

Waste as to
Timber.

38. Timber trees are parcel of the inheritance, and a tenant for life or years has only a right to their shade and fruit during the term. It is waste if he cuts them down,^b or does any act to cause them to decay, as if he lops or tops them.^c Timber trees are such as are useful for the purpose of building. Oaks, ashes, and elms are timber in all places.^c Thorn-trees, which have stood for sixty or a hundred years, have been accounted timber.^d In some countries where timber is scant, beeches and white-thorns are used for building, and therefore accounted timber: in such case it is waste to fell or injure them.^e In the Countess of Cumberland's case,^f birches of a hundred years' growth, which were serviceable for timber, for sheep-houses, cottages, and other mean buildings, were held to be timber, which a tenant for life had no right to cut. If by custom oaks and ashes are seasonable wood, and cut at stated times, the tenant may cut them at such times: thus, if it is customary to cut ashes every ten years, the tenant may cut them.^g

It is also waste to cut down any trees, though not timber, such as beeches, maples, willows, &c., which are planted for the defence or ornament of

^a *Beaty v. Gibbons*, 16 East, 116.

^b Co. Lit. 53 a.

^c Co. Lit. 53 a. *Samuel v. Johnson*, Dyer, 65 a.

^d *Moyle v. Mayle*, Owen, 65.

^e Co. Lit. 53 a. *Palmer's case*, 9 Jac. Hale's note to Co. Lit. 53 a. *Barret v. Barret*, Hetley, 35.

^f *Moor*, 812.

^g 2 Rol. Abr. 817. Vin. Abr. Waste, E.

the house, or in a pasture-field for the shade of cattle, or on a bank to sustain it,^a or which form part of a hedge, it being the apparent intention of the landlord or grantor of the estate that such trees shall continue.^b

It is not waste to cut down trees which are not timber, either by law or custom, and are not planted for any of the above special purposes, in such a manner that they will grow again. Thus a tenant for years may lawfully cut down willows, leaving the stools or butts from which they will shoot afresh.^c Whitethorns, blackthorns, and hazels may in like manner be cut down.^d

Nor is it waste to cut the underwood of hazels, willows or thorns, maple or oak. But if the tenant dig up such trees, or underwood, or suffer the germins to be bitten by cattle after they are felled, so that they will not grow again, or mow the stocks with a wood scythe, it is waste.^e Against such waste the Court of Chancery will grant an injunction.^f It is not waste for the tenant to fell timber trees which are completely dead, and bear neither fruit nor leaves,^g and have not sufficient timber in them for buildings or posts.^h

If timber trees are blown down by tempest, or severed from the land by other means, they become

^a 12 Hen. VIII. 1. Sir George Stripping's case. Winch, 15.

^b Co. Lit. 53 a. Guffy v. Pindar, Hob. 119. Cro. Jac. 126, pl. 15.

^c Phillipps v. Smith, 14 M. and W. 589.

^d 2 Rol. Abr. 817. Vin. Abr. Waste, E.

^e Sir John Gage v. Smith, Godb. 210. 2 Rol. Abr. 817.

^f Humphries v. Harrison, 1 Jac. and Walk. 581.

^g Co. Lit. 53 a. 2 Rol. Abr. 814.

^h Manwood v. Myme, Dyer, 332. Moore, 101.

the property of the tenant who takes the first estate of inheritance.^a But if dotards, or old trees which have no timber in them, are blown down, they become the property of the tenant.^b And if the landlord fells such trees during the term, the tenant may take them.^c

As the tenant is entitled to cut hedges and bushes, the cuttings belong to him; and if a stranger cut them, the landlord cannot maintain an action.^d The trimmings of fir-trees under twenty years old belong to the tenant for life, and not to the remainderman.^e

The tenant being entitled, during his term, to the shade and fruit of timber trees, if the landlord fell them, he may maintain trespass.^f

An equitable tenant for life has no right to cut timber without the consent of the trustees; if he does, he is bound to account for the timber and its proceeds to the trustees.^g

Felling decayed
Timber.

39. When timber is in a state of decay, and will not improve by standing, but is likely to do damage to other trees, and when the felling of it will be a benefit to all parties concerned, the Court of Chancery will order it to be cut down, either on the application of the tenant for life or of the remain-

^a *Bewick v. Whitfield*, 3 P. Wms. 257.

^b *Herlakenden's case*, 4 Rep. 63 b. *Countess of Cumberland's case*, Moore, 812.

^c *Channan v. Patch*, 5 B and C. 897.

^d *Berriman v. Peacock*, 9 Bing. 384.

^e *Pidgeley v. Rawling*, 2 Coll. C. G. 275.

^f *Mervyn v. Lydds*, Dyer, 90 b. *Moor*, 7. *Tregonel v. Rives*, Sir W. Jones, 376.

^g *Denton v. Denton*, 7 Beavan, 388.

derman. When the application is by the remainderman, care will be taken that the tenant for life is not prejudiced by those trees being taken which are necessary for repairs.^a The Court will not order generally that those trees be cut down which are fit to be cut, and which a provident owner might think fit for felling.^b Timber will on like conditions be ordered to be cut when the tenant entitled to it is an infant.^c

When trees are thus felled by order of the Court of Chancery, the produce of the sale is invested, and the tenant for life has the interest for his life, such being equivalent to the fruit and shade of the trees.^d The first person entitled to cut timber is entitled to the capital invested. Thus, when lands are conveyed in trust for A., for life remainder to B., for life without impeachment for waste, the proceeds arising from the sale of timber belong to B. on the death of A.^e

Ornamental timber and trees planted for the defence and safety of the house will not be allowed to be cut down, though decaying.^f

40. A tenant for life or years may cut timber for

Right to cut
Timber for
Repairs, &c.

^a Bewick v. Whitfield, 3 P. Wms. 267.

^b Tollemache v. Tollemache, 1 Hare, 456. Ferrand v. Wilson, 4 Hare, 344.

^c Consett v. Bell, 1 Younge and Col. N. C. 569.

^d Wickham v. Wickham, 19 Ves. 419. Toker v. Annesley, 5 Sim. 231. Waldo v. Waldo, 7 Sim. 261. Mildmay v. Mildmay, 4 Brown, C. C. 76.

^e Waldo v. Waldo, 12 Sim. 107. Phillips v. Barlow, 14 Sim. 263.

^f Bewick v. Whitfield, 3 P. Wms. 267. Lushington v. Boldero, 6 Mad. 149. Chamberlain v. Dummer, 1 Brown, C. C. 166.

the repairs of his house, barns, or fences,^a for the necessary purposes of husbandry, or to be consumed as firewood. He may fell timber to repair houses which he is not strictly bound to repair; for instance, those which were ruinous at the time of the lease, or those which the lessor covenants to repair, because the law favours the supportation of houses of habitation for mankind.^b But he cannot take timber for improvements, such as to make fences where none existed before; or to repair houses which he has wasted, or suffered to be wasted:^c nor can he cut timber for the purposes of working mines, such being no benefit to the land.^d The right to cut timber for firewood is qualified, and the lessee can only justify cutting timber trees for that purpose when there is no underwood or deadwood upon the land.^e

Timber can only be cut down for the express purpose of being used in the repairs of buildings, &c. It cannot lawfully be sold to raise money for the purchase of other timber;^f nor can it be exchanged for other timber better adapted for the repairs in question.^g If the timber be cut down *bonâ fide* for the purpose of being used in reparations, the tenant is justified, though he may have

^a *Manwood's case*, Moore, 101.

^b Co. Lit. 54 b. *Contra per Knightley, Maleverer v. Spinke*, Dyer, 36 a.

^c Co. Lit. 53 b.

^d *D'Arcy's case*, Hutt. 19. Hob. 234.

^e Co. Lit. 53 b. 2 Rol. Abr. 820, pl. 9.

^f *Lewis Bowles' case*, 11 Rep. 82 a. Co. Lit. 53 a. *Simmons v. Norton*, 7 Bing. 640.

^g *Attorney-General v. Lord Stawell*, 2 Anst. 601.

over-calculated the quantity required ;^a but he cannot cut down timber by way of anticipation, to be used in dilapidations which may happen at some future time.^b

Where, by the lease, the lessor is to assign trees to the lessee for requisite repairs, and a particular tree is assigned to the lessee by the lessor's bailiff, such assignment operates as a delivery, and vests the property of the tree in the lessee, who may fell at any time afterwards.^c

41. Where the tenant covenants to deliver up all the trees standing in an orchard at the time of the demise, reasonable use and wear only excepted, he is not precluded from removing trees decayed and past bearing from a part of the orchard which is too crowded.^d Where there is a covenant not to remove or grub up trees, the tenant cannot remove trees from one part of the premises to another, unless they are dead, even although he plant more trees than he removes.^e

42. Sometimes trees are excepted out of the lease ; they are then considered as in the possession of the lessor, and are not subject to dilapidations or waste ; but if the tenant cut or fell them, the landlord may have an action of trespass against him.^f Where trees generally are excepted out of a lease,

^a East v. Harding, Cro. El. 498. Doe d. Foley v. Wilson, 11 East, 56.

^b Georges v. Stanfield, Cro. El. 593.

^c Courtenay v. Fisher, 4 Bing. 3. 12 Moo. 39.

^d Doe d. Jones v. Crouch, 2 Camp. 449.

^e Doe d. Wetherell v. Bird, 6 C. and P. 195.

^f Goodright d. Peters v. Vivian, 8 East, 190. Rolls v. Rock, 2 Sel. N. P. 1316, 7th edit.

Covenant as to
Trees.

Where Trees
are excepted
out of Lease.

such exception is construed to relate to timber trees only, and not to apple or other fruit trees, or the like; since, if it did, the tenant would not be entitled to the fruit of such trees.^a And where the exception was of timber and other trees, but not the annual fruit thereof, it was held that apple-trees were not within it, because it was to be construed strictly against the lessor.^b

Where the lease excepted all timber and other trees, bushes, and thorns, other than such bushes and thorns as should be necessary for the repair of the fences, it was held that all trees, bushes, and thorns were excepted from the lease, and that the bushes and thorns which might be necessary to repair the fences were not excepted from the exception, but that the tenant had merely liberty to take such, and to sue the landlord for a breach of covenant in case he should take all the bushes and thorns, and the tenant should require any to repair the fences.^c

Remedies for
Dilapidations.
By Action

43. The remedy for dilapidations against tenant for life or tenant for years is by action on the case for the injury to the inheritance, or the breach of duty; or by action of covenant, or on promises, for the breach of contract, where there is a covenant or agreement to repair. The mixed action of waste, in which the place wasted and treble damages were recovered, has been abolished by 3 & 4 Wm. IV. c. 27, s. 36.

On the Case.

The action on the case is maintainable in the same cases as the action of waste was; and in some

^a Wyndham v. Way, 4 Taunt. 316.

^b Bullen v. Dunning, 5 B. and C. 842.

^c Jenney v. Brook, 6 Q. B. 323.

others: it is founded on a duty arising either from privity of estate, or from a contract.

To have entitled a person to a writ of waste, he ^{By whom.} must have had an estate of inheritance in remainder immediately after the estate of the tenant guilty of waste: thus where an estate was limited to A. for life, remainder to B. for life, no writ of waste could be had against A. by B., or by the reversioner; but if the remainder was to B. for years, waste was maintainable by the reversioner, because his freehold vested immediately on determination of A.'s estate.^a A tenant in tail after possibility of issue extinct could not have maintained a writ of waste, because he was in effect but tenant for life.^b

In a recent case, in which lands were left to a husband and wife for their joint lives, and the estate of the husband became vested in the defendants, who permitted waste, it was held that the wife, who survived the husband, could not maintain an action on the case for the waste, because she had no vested interest at the period when the waste was committed.^c The Court apparently grounded their decision on the authorities relating to the action of waste. Perhaps where the action on the case is founded upon privity of estate, it will only lie in those cases in which an action of waste could have been maintained.

In *Jefferson v. Jefferson*,^d the plaintiff, who had

^a 2 Inst. 301. ^b Co. Lit. 53 b. 2 Rol. Abr. 825, pl. 5.

^c *Bacon v. Smith*, 1 Q. B. 345.

^d 3 Lev. 130. See 2 Wms. Saund. 352 a, *note*, where it is said that case for waste may be maintained by a remainderman for life or years, but no authority is referred to.

the remainder in fee in a copyhold, sued the defendant, who was tenant for life, in an action on the case for waste. Windham and Charleton, J J., held that the action would not lie, because it was not within the statute of Gloucester, and because the jury could not tell what damages to give, it being uncertain how long the tenant for life would live, and he might repair the damage; but Pemberton, C. J., and Levinz, J., held that it would, by reason of the injury to the reversion. No judgment was given.

Against whom. A writ of waste ought to have been brought against tenant by the curtesy or tenant in dower, although he had conveyed his estates, because the grantee of such tenant was not tenant by the curtesy, or tenant in dower.^a But if a tenant for life or years assigned his estate, the action should have been against the assignee, and not against the original tenant.^b

The heir was not entitled to sue for waste in the time of his ancestor, nor the alienee in respect of waste before the conveyance to him, nor the successor of a corporation sole, who had power to make a will, as of a bishop, archdeacon, parson, or prebendary, for waste done in the time of his predecessor.^c

**Amount of
Damage.**

An action of waste was not maintainable where the damage to the inheritance was less than 3*s.* 4*d.*^d If the jury found the damage to be less than that

^a 2 Rol. Abr. 828. Bac. Abr. Curtesy, E.

^b 2 Rol. Abr. 828. 2 Inst. 302.

^c 2 Rol. Abr. 824. Vin. Abr. Waste, O.

^d 2 Wms. Saund. 250, n.

amount, the defendant was entitled to judgment;^a and this rule has been applied to an action on the case for waste.^b

Nor could such action be maintained where the tenant repaired the waste before action brought, because the jurors ought to view the waste.^c

An action on the case founded on privity of estate may be maintained against a tenant for years who has covenanted to repair; the covenant not destroying the obligation respecting waste imposed by the statute, nor the remedy for enforcing it.^d This form of action may be sustained as well for permissive as voluntary waste, it having been decided to be an appropriate remedy as well for the non-performance of a positive duty as for the breach of a negative one.^e

An action on the case will also lie for a breach of duty in non-repairing, arising out of contract, and where the obligation is not founded on the statute of Gloucester; as by lessee against his assignee, to whom he has assigned, subject to the performance of the covenants in the original lease, for not repairing, according to the covenant, whilst he held the premises as assignee.^f

^a *Governors of Harrow School v. Alderton*, 2 B. and P. 86.

^b *Rigg v. Parsons*, cited 2 East, 156; but see the observation of Le Blanc, J., in *Pindar v. Wadsworth*, 2 East, 164.

^c 2 Inst. 306, 307. Co. Lit. 53 a; 283 a. *Dyer*, 276 a, pl. 51. *Whelpdale's case*, 5 Rep. 119 b.

^d *Kinliside v. Thornton*, 2 W. Black. 1111.

^e *Brown v. Boorman*, 3 Q. B. 511. 11 Cl. and Fin. 1. See *Gibson v. Wells*, 1 New Rep. 290. *Herne v. Benbow*, 4 Taunt. 764. *Jones v. Hill*, 7 Taunt. 392, ante, p. 101, *et seq.*

^f *Burnett v. Lynch*, 5 B. and C. 589.

Covenant, or
Promises.

An action of covenant on a covenant, or an action on promises, on an unsealed agreement to repair, is founded upon the contract, and must be brought by or against the parties to the contract, without reference to their estate in the premises. Thus where A. and B. were joint tenants, and A. underlet to C., it was held that A. and B. could not join in an action against C. for breach of an agreement to repair.^a

The executor of a tenant for life, or in fee, may maintain an action for the breach of a covenant to repair in the lifetime of the freeholder, though the covenant runs with the land, and the heir or remainderman is entitled to have the dilapidations repaired. The dilapidated state of the premises during the life of the tenant for life is necessarily an injury to his personal estate.^b

An action cannot be maintained against the assignee of a lease for the breach of a covenant to repair before he became assignee; and if a declaration in covenant alleges by way of breach that the premises were out of repair as well before as after the assignment to the defendant, it is bad in arrest of judgment.^c And if the assignor is sued for dilapidations existing before the assignment, he has no claim on the assignee for an indemnity, although a less price may have been given for the lease in consequence of the dilapidations.^d

^a Steel v. Western, 7 Moore, 29.

^b Morley v. Polhill, 2 Vent. 56. 3 Salk. 109. Raymond v. Fitch, 2 C. M. and R. 588. Ricketts v. Weaver, 12 M. and W. 718.

^c Brittin v. Vaux, 1 Lutw. 360.

^d Hawkins v. Sherman, 3 Car. and Payne, 459.

An action either on the case for the injury to the reversion,^a or on the contract to repair,^b may be maintained during the term, notwithstanding the tenant may repair the dilapidations before the expiration of his interest. The dilapidated state of the premises at any time is an injury to the landlord, and may depreciate his reversion. The non-performance of an express contract is necessarily, and, by agreement of the parties, an injury, although no actual damage may be proveable.

In an action for breach of a covenant to repair,^c Amount of Damage. brought during the lease, the landlord is not entitled to recover the amount necessary to put the premises in repair, because he is not bound to expend the money recovered in repairs, and cannot do so without the consent of the tenant. The tenant remains liable to repair, notwithstanding the recovery. He is entitled to a sum equivalent to the depreciation of his reversion in consequence of the dilapidations;^d and it has been held that he is entitled only to nominal damages.^d

Although the time the lease has to run, the continuing obligation of the tenant to repair, and the right of the landlord to sue again if the premises remain out of repair, are to be taken into consideration in estimating the damages; the fact that some

^a *Thomlinson v. Brown*, Sayer, 215. *Queens' College v. Hallett*, 14 East, 489. See *Jefferson v. Jefferson*, 3 Lev. 130.

^b *Luxmore v. Robson*, 1 B. and Ald. 584, overruling *Main's case*, 5 Rep. 21 a.

^c *Doe d. Worcester Trustees v. Rowlands*, 9 C. and P. 734. See also *Turner v. Lamb*, 14 M. and W. 412.

^d *Marriott v. Cotton*, 2 Car. and Kir. 553.

of the dilapidations happened before the title of the plaintiff accrued, does not entitle the tenant to have the value of such deducted from the amount of damages. The heir is entitled to have the premises put in a proper state of repair directly his title accrues, and to recover damages in respect of the depreciation of his estate in consequence of their not being in such state; but he is not entitled to recover damages by reason of the premises having been in a dilapidated state in the time of his ancestor.^a

If a leaseholder under covenant to repair grants an under-lease containing a corresponding covenant, which the under-tenant neglects to perform, and the superior landlord sues the first lessee or forfeits his term, the dilapidations permitted by the sub-tenant being a breach of the covenant in the original lease, the first lessee is not entitled to recover from the under-lessee the costs of the action brought against him, or the value of his forfeited term; the action and the forfeiture being caused by the breach of his own covenants, and not being the necessary and ordinary consequences of the under-lessee's breach, and the covenant to repair not being a covenant to indemnify.^b He is entitled in such case to a sum sufficient to repair the dilapidations.^c

Against Tenant
at Will.

If tenant at will, or tenant holding over, after

^a *Vivian v. Champion*, 2 Lord Ray, 1125. 1 Salk. 141. Holt, 128; observed upon by Parke, B., in *Turner v. Lamb*, 14 M. and W. 413, 414.

^b *Penley v. Watts*, 7 M. and W. 601. *Walker v. Hatton*, 10 M. and W. 249, overruling *Neale v. Wylie*, 3 B. and C. 533. *Clow v. Brogden*, 2 Man. and Grang. 39. *Logan v. Hall*, 4 C. B. 594.

^c *Clow v. Brogden*.

his interest has expired, by the sufferance of the lessor, commit any act of waste, the lessor may either have an action of trespass, treating the act of waste as a determination of the right of possession,^a or he may maintain an action on the case, treating the possessory right of the tenant as continuing, and the act as injurious to his reversion.^b

44. Frequently, by the terms of leases, the breach of a covenant to repair operates as a forfeiture of the lease. In such case the lessor may enter or maintain ejectment where the tenements are dilapidated. It should appear that the premises are out of repair at the time the landlord elects to forfeit the lease, since it is forfeited or valid at his election. If he proceeds by ejectment, he lays the demise on the day on which he elects to forfeit the lease, and impliedly admits that it subsisted up to that day; it therefore should appear that the premises were then out of repair. This may be shown indirectly, as where the demise was laid on the 14th January, and it appeared that the premises were in bad repair on the 7th, the evidence was considered sufficient, the Court saying, that if the tenant had repaired the premises in the interval, he should have proved the fact.^c

It being at the election of the landlord to forfeit the lease for breach of covenant, he may waive the breach. The non-repair of premises is a continuing

^a *Walgrave v. Somerset*, 4 Leon. 167. Lit. s. 71. Co. Lit. 57 a. *Countess of Shrewsbury's case*, 5 Rep. 13 b. *Moore*, 248, pl. 392.

^b *West v. Treude*, Cro. Car. 187. Sir W. Jones, 224. *Burchell v. Hornsby*, 1 Camp. 360.

^c *Doe d. Hemmings v. Durnford*, 2 C. and J. 667.

forfeiture, so long as they remain dilapidated; and therefore, although the lessor have received rent, or done other act to acknowledge the tenancy subsequent to the tenements becoming dilapidated, yet if they continue unrepaired after such waiver, he may enter.^a Where there was a general covenant to repair, and a covenant to repair within a certain time after notice, and the landlord gave the tenant notice to repair *forthwith*, it was held that such notice was no waiver of the right of entry accruing under the general covenant to repair.^b But in a similar case, where the landlord gave the tenant notice to repair within the time specified by a limited covenant, it was held that he could not enter until such time had expired; since by the notice he gave the tenant the time specified to purge his forfeiture, and impliedly engaged that the tenancy should so long continue.^c And where the lease contained a general covenant to repair, and a covenant that the landlord might give the tenant notice of all wants of repair, and if he did not repair within two months the landlord might enter and do the repairs himself, and distrain for the expense; the landlord, by giving notice under the special covenant, was held to have absolutely waived his right to enter for breach of the general covenant.^d But merely enlarging the time for the tenant to do the repairs, where he covenants to do them within a limited

^a Fryett d. Harris v. Jeffreys, 1 Esp. 393. Doe d. Sore v. Akers, 1 Ry. and Moo. 29. 1 Car. and Payne, 154.

^b Roe d. Goatly v. Paine, 2 Camp. 520.

^c Doe d. Morecraft v. Meux, 4 B. and C. 606.

^d Doe d. De Rutzen v. Lewis, 5 A. and E. 277.

time after notice, suspends, but does not absolutely waive the right of re-entry for breach of such covenant.^a A covenant to do some particular act to the improvement of the tenements, as to make a shop front, is different from a covenant to keep in repair; and the breach of such a covenant is single and distinct, and not continuing; therefore, if a right of entry accruing under such a covenant be once waived, the non-performance of the covenant can never afterwards be taken advantage of as a forfeiture of the lease.^b The acknowledgment of tenancy relied upon as a waiver must be the act of the lessor, or of some person authorized by him for that purpose; and therefore the receipt or demand of rent by an agent, who it did not appear had authority to do more than receive the rent, was held to be no waiver of a forfeiture occasioned by the breach of a covenant to make a shop front.^c

The leaning of the law is against forfeitures, and therefore, where the lord of a manor licensed an act which would have otherwise been waste and a forfeiture, upon the condition of the copyholder subsequently performing an act by which the injury to the lord would have been compensated, and the tenant, having committed the act licensed, refused to perform his part of the agreement, it was held that the lord could not enter for the forfeiture.^d

The Common Law Court, in which an action of ejectment is brought, has no power to stay the

^a Doe d. Rankin v. Brindley, 4 B. and Ad. 84.

^b Doe d. Nash v. Birch, 1 M. and W. 402.

^c Doe d. Wood v. Morris, 2 Taunt. 52.

action upon payment of costs when the repairs have been done.^a

Relief in
Equity against
Forfeiture.

45. It has in some cases been attempted to obtain relief in equity against forfeitures incurred by dilapidations, on the ground, that when the premises are put in repair, the lessor is not injured; but the Court has considered, that to award relief in such cases would be an improper interference with the agreement of the parties, and that it has no means of ascertaining the exact amount of injury sustained by the landlord, and of placing him in the same situation as before the forfeiture incurred.^b Chancery will relieve against forfeitures incurred by non-payment of money; rent, for instance, because it is thought, that if the tenant pay the rent, interest, and all costs, the landlord is not damnified; and in one case, where there was a covenant to lay out a certain sum of money in repairs, Lord Erskine relieved against the forfeiture.^c This decision has been repeatedly doubted, and the Court of Exchequer subsequently refused relief in a similar case.^d But relief against a forfeiture by breach of a covenant to repair may, it seems, be granted under

^a Doe d. Mayhew v. Asby, 10 A. and E. 71.

^b Wadham v. Calcraft, 10 Ves. 67. Eaton v. Lyon, 3 Ves. 692. Mosely v. Virgin, 3 Ves. 184. Hill v. Barclay, 16 Ves. 402; 18 Ves. 56. Hack v. Leonard, 9 Mod. 90, (where a suit to be relieved against a verdict in ejectment for non-repair was entertained, the Lord Chancellor saying, he did not see what damage could be sustained if the lessee kept the main timber from being rotten, and repaired before the end of the term,) may be considered as overruled.

^c Sanders v. Pope, 12 Ves. 280. Denis v. West, 12 Ves. 475.

^d Bracebridge v. Buckley, 2 Price, 200.

special circumstances, as where the tenant neglects to repair in consequence of a treaty between his landlord and a public company, the result of which may be that the premises will be pulled down for works authorized by an Act of Parliament.^a

46. Equity will restrain waste by injunction. In *Injunction*. order to induce the Court of Chancery to interfere, there must be an apparent intention on the part of the tenant to do some irreparable injury to the premises. The evidence of this intention usually relied on is some act of waste committed by the tenant; but a mere preparation to injure the tenements is obviously sufficient, such as sending a surveyor to mark trees,^b or threatening to open mines.^c In one case an injunction was granted where a tenant insisted on a right to do waste.^d

Where the waste done or contemplated is trivial, such as digging peat by a tenant in dower,^e or cutting down trees of small value for the purpose of giving more room for other timber,^f no injunction will issue; nor will an injunction be granted where the acts complained of have been done some time before the application is made, since such acts do not warrant the inference that the tenant will commit waste in future. It has been held, that a party will not be enjoined from committing ameliorating waste, building upon the premises, for instance;^g

^a *Hannam v. South London Water Works*, 2 Mer. 65, n.

^b *Jackson v. Cator*, 6 Ves. 688.

^c *Gibson v. Smith*, 2 Atk. 182.

^d *Barnardiston*, 494.

^e *Wilson v. Bragg*, Bac. Abr. Waste, O.

^f *Barry v. Barry*, 1 Jac. and Walker, 651.

^g *Molineux v. Powell*, 3 P. Wms. 268, n.

but it would seem that the Court of Chancery will restrain a tenant from altering the tenements, if such alterations be disagreeable to those who have a permanent interest in them, though the tenant may think and intend, and the majority of the world may think, that the alterations improve and beautify the property.^a If the act sought to be restrained is injurious to the estate, an injunction will be granted, although the tenant may have done, or intend to do, other acts to the benefit of the property. An injunction to restrain the cutting of turf will not be refused on the ground that the tenant has converted other cut-out bog into arable land.^b

An injunction will be granted to restrain the breach of husbandry covenants, where such breach will irreparably injure the property. For instance, where the tenant, under covenant to use pasture land in a husbandlike manner, ploughs and is about to convert it into arable;^c but an injunction will not issue to prevent a tenant, who covenants to leave all the manure upon the premises, from carrying it away, because the lessor may have an adequate remedy by compensation in damages;^d and where a penal rent is reserved, in case the lessee ploughs pasture land, he will not be enjoined, since the parties have provided for the contingency and fixed a compensation.^e A tenant holding under the Court will be restrained from removing manure con-

^a *Barry v. Barry*. 1 Jac. and Walk. 651.

^b *Coppinger v. Gubbins*, 3 J. and L. 397.

^c *Drury v. Molins*, 6 Ves. 328.

^d *Johnson v. Goldswaine*, 3 Anst. 751.

^e *Woodward v. Gyles*, 2 Vern. 119.

trary to the custom of the country. The injunction may issue on affidavits without a bill being filed.^a

Where the tenant or other party claims a right to do the acts complained of, if such acts, supposing them to be wrongful, will cause a certain and irreparable injury to the party resisting them, the Court of Chancery will grant an injunction until the right is tried, as where tenants of a manor, claiming estovers, were proceeding to cut down large quantities of timber of great value;^b and so where a tenant claimed the right to remove valuable trade fixtures which the landlord disputed, and it appeared that the right was doubtful.^c And so an injunction may be granted, against a party in possession of lands who claims to be absolutely entitled, at the instance of an adverse claimant.^d

But in the case of working mines the Court will never grant an injunction, unless it be in breach of covenant or an uncontroverted mischief; since where such mines are open, it may be presumed that the working of them is nothing more than taking the fair and ordinary profits of the land.^e

An injunction may also be obtained against a trespasser where the trespass continues so long as to become a nuisance, but not for every ordinary act of trespass.^f

^a Walton v. Johnson, 15 Sim. 352.

^b Stonnor v. Strange, Mitf. 123. Whitelegg v. Whitelegg, 1 Browne, C. C. 57. ^c Sunderland v. Newton, 3 Sim. 450.

^d Haigh v. Jagger, 2 Col. C. C. 231. See Davenport v. Davenport, 13 Jur. 227.

^e Anon. Amb. 209. Lowther v. Stamper, 3 Atk. 496.

^f Coulson v. White, 3 Atk. 21. Courthorpe v. Maplesden, 10 Ves. 290.

From this instance it will be perceived, that it is not requisite there should be any privity in order to obtain an injunction, but that any person having right to the land, and who will be prejudiced by the waste, may apply for this writ. Thus a ground landlord may enjoin the under-lessee of his tenant;^a and an injunction will issue to protect the contingent interests of an executory devisee, or of a child in ventre sa mère.^b And to restrain a party against whom there is no remedy for waste at common law, as where there are successive tenants for life, the first tenant for life may be enjoined from committing waste at the suit of the remainderman for life, or the reversioner.^c

Although but one act of waste be proved, the injunction will go to restrain waste generally.^d In cases of great urgency, where the party complained of has no pretence of right, an injunction will be granted in vacation;^e but not so where the defendant claims the inheritance, unless it clearly appear that his claim is without foundation.^f

Account.

Where a party is entitled to an injunction, the Court of Chancery, for the purpose of avoiding multiplicity of suits, will compel the defendant to account for the damages occasioned by waste already committed. But such account is merely auxiliary to the injunction, and cannot be decreed separately, since for compensation in respect of

^a *Farrant v. Lovel*, 3 Atk. 723. Amb. 105.

^b *Robinson v. Litton*, 3 Atk. 209.

^c *Perrot v. Perrot*, 3 Atk. 94. *Blagrove v. Blagrove*, 1 De G. and S. 252.

^d *Coffin v. Coffin*, 6 Mad. 17.

^e *Laythorp v. Marsh*, 5 Ves. 261.

^f *Lowther v. Stamper*, 3 Atk. 496.

waste already done there is a full and adequate remedy at law.^a

Although a bill for an account of waste may be sustained against a party who has committed waste during the continuance of his estate, without praying an injunction; because, having committed waste, he may commit it again, and the injunction may be prayed at the hearing;^b such a bill cannot be supported against a party whose estate has determined.^c Nor will such a bill lie against the executor of a married woman, tenant for life, for waste committed by her husband, although the estate was devised to her upon the condition that she should keep the buildings in substantial repair, and not commit waste. Her marriage was an alienation of her estate to her husband, and she was not liable for waste committed by him, any more than a tenant for life is for waste by his grantee.^d

There is no remedy in equity for permissive waste:^e nor will a suit be entertained against a tenant for life to compel him to repair:^f nor against the executor of an equitable tenant for life of a lease for dilapidations.^g

In one case an injunction was granted against permissive waste by a tenant for life to whom

^a *Jesus College v. Bloom*, 3 Atk. 262. Amb. 54. *Bishop of Winchester v. Knight*, 1 P. Wms. 106.

^b *Smith v. Cooke*, 3 Atk. 378.

^c *Jesus College v. Bloom*, 3 Atk. 262.

^d *Kingham v. Lee*, 15 Sim. 396.

^e *Lord Castlemaine v. Lord Craven* (1733), 22 Vin. Abr. 523, tit. Waste, S. a.

^f *Wood v. Gaynon*, Amb. 395.

^g *Arkwright v. Colt*, 2 You. and Col. N. C. 4.

buildings were devised on condition that he should keep them in repair. The tenant did not appear to resist the application.^a

Right of Entry
to view Waste.

47. Besides the foregoing remedies, there are other proceedings which parties may take for the purpose of preventing or repairing dilapidations. By the common law the landlord or reversioner has a right to enter upon lands held by a tenant for a particular estate, for the purpose of viewing the state of repair;^b and if the tenant obstructs such entry, he is liable to an action on the case.^c The reversioner, however, ought to give the tenant notice of his intention to enter, so as not to take him by surprise.^d He cannot enter unless the outer door be open. He has no right to break doors or windows for the purpose of entering.^e If he abuses his right, as if he damages the house or stays all night, he is a trespasser *ab initio*.^f

Right of Less-
or to repair.

48. Where the tenements are dilapidated, the landlord has, generally speaking, no right to enter and do the repairs; all he is entitled to is to sue the tenant for breach of his contract to repair, and to recover damages commensurate to the depreciated value of his reversion.^g But if, by the stipulations of the lease, the term be forfeited by the tenant's neglect to repair, there it seems, as the lessor may enter and avoid the lease, he may enter and do the repairs without avoiding the lease. At

^a *Caldwell v. Baylis*, 2 Mer. 408.

^b 2 Inst. 306.

^c *Hunt v. Dowman*, Cro. Jac. 478.

^d *Doe d. Wetherell v. Bird*, 6 C. and P. 195.

^e 9 Hen. VI. 29 B. 2 Rol. Abr. 568.

^f 2 Rol. Abr. 561.

^g *Barker v. Barker*, 3 C. and P. 557.

all events, if the repairs be absolutely necessary to be done to prevent a forfeiture of his estate, he may recover all the money he lays out in necessary repairs, as damages sustained by him in consequence of his tenant's breach of contract.*

49. In an action for rent, the tenant proved that the landlord covenanted to repair, but did not, and that he expended the rent in the repairs. Gawdy and Clench held that the law gave the tenant the liberty to expend the rent in reparations; for he would be otherwise in great mischief, since the house might fall upon his head before it was repaired, and therefore the law allowed him to repair it and deduct from the rent. Fenner held that the matter proved was no defence; for if the lessor would not repair, the tenant should have an action of covenant against him.^b And Holt, C. J., has doubted whether the tenant can deduct from the rent monies expended in repairs which ought to have been done by the landlord, unless it is part of the covenant that he should deduct.^c

Remedies of
Lessee when
Lessor is
bound to
repair.

The tenant has no absolute right to claim all the money laid out in repairs against the lessor as a debt, since he may have ordered more repairs than he could have compelled the lessor to do, or have paid extravagantly for those done. Justice, therefore, requires that his remedy shall be by action on

* Colley v. Streeton, 2 B. and C. 273.

^b Taylor v. Beal, Cro. El. 222. 1 Leon. 237.

^c Clayton v. Kinaston, Lord Ray, 420. B. N. P. 176. Johnson v. Carre, 1 Lev. 152. See Graham v. Tate, 1 Maule and Sel. 609. 14 Hen. IV. 27. Bro. Dette, pl. 72. Trin. 11 Rich. II. Fitz. Barre, pl. 242, cited 7 M. and G. 581, a.

the lessor's covenant, in which he shall recover such damages as he has unavoidably sustained in consequence of the lessor's breach, and shall prove that all the money expended was necessarily expended.

In *Maleverer v. Spinke*^a it is said, when the lessor is bound to repair, the lessee cannot take timber growing on the premises, and do the repairs himself; at all events, not without notice to the lessor. If the lessor, after notice and request, be negligent, whereby the house falls, the lessee may have an action against him. And it seems that the lessee cannot charge the lessor for not repairing without notice, for the lessor may not know that repairs are necessary.^b

Where the landlord covenanted to repair the external parts of the demised premises, and the adjoining house was pulled down, under an Act of Parliament for improving the town, whereby the side wall of the demised premises sank, and it became necessary to rebuild it; it was held that he was bound forthwith, after the adjoining house was pulled down, to take precautionary steps to prevent the wall sinking; and that he having refused to repair, the tenant was justified in repairing the wall before a reasonable time for the landlord to do so had elapsed, and was entitled in an action on the covenant to recover the costs of the repairs, and of removing and replacing fixtures,

^a *Dyer*, 36 a.

^b Per Mansfield, C. J., and Gibbs, J., in *Moore v. Clark*, 5 Taunt. 96. See also *Vyse v. Wakefield*, 7 Dowl. 377, 912. *Earl v. Thorogood*. Cro. El. 834.

and for plate-glass damaged, which removal and damage might have been prevented, had the landlord taken precautions to prevent the wall sinking, directly he knew of its ruinous state: but that he was not entitled to recover the rent paid for another residence, and the expense of removing there, while the wall was under repair; because the landlord did not covenant to provide him with a residence whilst the external parts of the house demised were under repair, or to insure him against such parts becoming ruinous.^a

^a Green v. Eales, 2 Q. B. 225.

CHAPTER III.

DILAPIDATIONS BY TENANT WITHOUT IMPEACHMENT
OF WASTE.

1. General Rights of such Tenant.—2. Destruction of Mansion-House, &c.—3. Felling of ornamental Timber.—4. Waste by Tenant for Years without Impeachment towards the End of his Term.—5. Where general Meaning of Words without Impeachment, &c., restricted.—6. Remedy for equitable Waste.

General Rights
of such Tenant.

1. THE statute of Marlbridge^a prohibits farmers *making waste without special licence had by writing of covenant making mention that they may do it.* If a tenant has this special licence, he is tenant without impeachment of waste. It was at first decided, that a tenant without impeachment of waste had no absolute property in trees or other things affixed to the soil, but was merely exempt from being called to account for any waste he might commit or permit; and that, therefore, if he cut down trees, the party entitled to the inheritance might take them;^b but it was afterwards held that the clause, without impeachment of waste, not only exempted him from an action of waste, but conferred on him a greater interest and more extended power over the land than was possessed by an ordinary tenant for life. It was considered that he had

^a Ante, p. 93.

^b Finch's case, 4 Rep. 62 b.

the right to take things as produce, which, in the case of an ordinary tenant for life, are inseparably attached to the land, and which such tenant only has the temporary right to use as part of the land. Thus it was held that he might cut down trees for his own benefit, and that if they were blown down, this property would be in him; and also, that he might open mines and take the produce.^a

Although he has power to cut timber, and the property in it when cut and severed, he has not the absolute interest in the timber whilst it is growing; and therefore if the land, with the timber growing thereon, is sold under a power, or for the redemption of the land-tax, the tenant without impeachment for waste is not entitled to the price of the timber.^b

Such being the legal construction of the clause "without impeachment of waste," the estate is, in point of law, as it were, a parcel of the fee, differing little from an estate in fee, save as to its durability, and subject to none of those salutary restrictions which the law usually infers from the temporary nature of a tenure.

Equity, however, places a more limited construction on the clause "without impeachment of waste." It considers that there are things the very nature of which afford evidence that it is not intended to confer on a temporary tenant the right to destroy or to alter; that the intention is to give the

^a Lewis Bowles' case, 11 Rep. 82 b. Co. Lit. 220 a.

^b Cholmeley v. Paston, 3 Bing. 207. S. C. in error, Cockerell v. Cholmeley, 10 B. and C. 564. 1 Cl. and Fin. 60. Doe d. Blewitt v. Phillips, 1 Q. B. 84.

tenant without impeachment of waste all those powers which it is probable a prudent and consistent tenant in fee would exercise. He has power, therefore, to take the permanent products of the land, as timber planted for the sake of profit; to take that portion of the land itself which is usually turned to profit, such as minerals and brick earth; but he has no power to remove, either wantonly or mercenarily, those things which are obviously intended to continue permanently a part of the land, and which derive their chief value from their attachment to the land. Thus he cannot pull down houses, or destroy pleasure grounds, or prostrate trees planted for the ornament or shelter of the chief mansion; such acts, being only cognizable in a Court of Equity, are called equitable waste.

Tenant in Tail
after possibility
of Issue ex-
tinct.

It should be observed, that tenant in tail after possibility of issue extinct stands in the same predicament as tenant without impeachment of waste, is entitled to timber not ornamental,^a and may be restrained in equity from committing destruction of the premises.^b

Destruction of
Mansion-
House, &c.

2. If tenant without impeachment of waste attempt to pull down houses, equity will enjoin him, and if he has pulled them down, will compel him to rebuild, as in *Vane v. Lord Barnard*;^c where Lord Barnard, being tenant for life without impeachment of waste, of Raby Castle, having taken some

^a *Williams v. Williams*, 15 Ves. jun. 419. 12 East, 209. 3 Mad. 519.

^b *Abraham v. Bubb*, 2 Freem. 53. 2 Show. 68. Anon. 2 Freem. 278. *Cook v. Whalley*, 1 Ab. Eq. 400.

^c 2 Vern. 739. 1 Salk. 161.

displeasure at his son, assembled two hundred workmen, and began to strip the castle of the lead, iron, glass, doors, and boards, to the value of £3000. Lord Cowper, Chancellor, granted an injunction, and upon the hearing decreed that the castle should be repaired, and put in the same condition as before. And in another case,^a where Lord Somerville, tenant for life without impeachment of waste, pulled down several houses and outbuildings upon the estate, and sold the materials, and took up lead water-pipes, Lord Hardwicke decreed that the buildings and water-pipes should be restored, though he would not order an account of ornamental timber cut down, because the bill was filed by a remainderman for life. A tenant without impeachment of waste who pulls down a mansion-house, or fells ornamental timber, is not excused on the ground that the act was prudent, and one which a tenant in fee would have done, because in so doing he is dealing with other persons' property, which he has no right to do. The Duke of Leeds, who was tenant for life without impeachment of waste, having two residences, and the dukedom being poor, pulled down one, and felled the ornamental timber attached to it. It was held to be equitable waste.^b At law the remainderman has no property in the ornamental timber, so as to maintain trover for it when wrongfully felled.^c Nor has he any property in the materials of the houses when severed; and therefore, if the house be prostrated

^a Rolt v. Lord Somerville, 2 Eq. Cases, Abr. tit. Waste, pl. 8.

^b Duke of Leeds v. Earl Amherst, 2 Phil. 117.

^c Pyne v. Dor, 1 D. and E. 55.

by tempest, the materials belong to tenant for life, and he is not bound to rebuild.^a

Felling
ornamental
Timber.

3. The Court of Chancery will issue an injunction to restrain tenant for life without impeachment of waste from cutting down trees planted for ornament or shelter of the chief mansion-house, or which grow in lines, or avenues, or ridings; and so for cutting saplings and trees not fit to be cut as timber.^b The question in these cases is, whether the trees were planted designedly for ornament, and not whether they are or are not, in point of fact, ornamental. Although cutting down the timber may increase the beauty of the estate, yet the taste of the grantor is binding upon the tenant for life, and the Court cannot enter into an inquiry as to what is or what is not beautiful; all it has to ascertain is the intention of the grantor of the estate.^c It is therefore nothing to the purpose to say, on the one hand, that the trees are not ornamental, and that cutting them down will widen the avenues, and prevent damp, and altogether improve the place;^d nor, on the other hand, is it sufficient to state that the trees threatened to be cut down are ornamental, unless it be shown that they were planted for ornament.^e

^a Lewis Bowles' case, 11 Rep. 79.

^b Packington v. Packington, 3 Atk. 215. Abraham v. Bubb, 2 Freem. 53. Leighton v. Leighton, 1 Bro. Chan. Ca. 167. See as to Saplings, Aston v. Aston, 1 Ves. 264.

^c Chamberlayne v. Dummer, 1 Bro. C. C. 166. Per Lord Eldon, 6 Ves. 149. Lushington v. Boldero, 6 Mad. 149.

^d Chamberlayne v. Dummer.

^e Coffin v. Coffin, Jac. 70. Williams v. Macnamara, 8 Ves. 70.

Trees which are planted to exclude objects from view are considered as ornamental.^a And plantations, vistas, avenues, and rides for ten miles round the house, the tenant will be enjoined from altering.^b He cannot cut trees in any woods which so adjoin the house as to serve for ornament or shelter to it.^c A clump of trees standing on a common two miles distant from the mansion-house, if planted for ornament, cannot be felled.^d But an injunction has been refused to restrain the tenant from cutting timber which merely protected the premises from the effects of the sea.^e Where trustees under a power had pulled down the mansion-house and sold the materials, the tenant for life was enjoined from cutting down timber planted for ornament.^f And where there was a house, at the time of the settlement, with a lawn and ornamental trees, in which the settlor had resided, but had commenced building another house, and had gone to reside with his son, it was held that the house was settled as a residence, and that the tenant had no right to pull down the house and cut down the trees.^g

4. Where a lease was made by a bishop for twenty-
one years, without impeachment of waste, and the
tenant cut down none of the trees till about the
end of the term, when he began to fell them,

Waste by
Tenant for
Years without
Impeachment
towards the
End of his
Term.

^a Day v. Merry, 16 Ves. 375.

^b Marquis of Downshire v. Sandys, 6 Ves. 107. Tamworth v. Ferrers, 6 Ves. 419. Davis v. Leo, 6 Ves. 767.

^c Newdigate v. Newdigate, 1 Sim. 131.

^d Marquis of Downshire v. Sandys, 6 Ves. 107.

^e Coffin v. Coffin, Jac. 70.

^f Wellesley v. Wellesley, 6 Sim. 497.

^g Morris v. Morris, 2 Phil. 205.

the Court of Chancery granted an injunction; for though it was said he might have cut down trees every year from the beginning of his term, and then they would be growing up gradually, yet it was unreasonable that he should sweep them all away towards the end:^a and in another case,^b where a bishop's lessee without impeachment of waste, twenty years before the expiration of his term, articted with brickmakers that they might dig away twenty acres of the soil six feet, the Lord Chancellor enjoined him from proceeding with his digging, because it was a destruction of the inheritance.

Where general
Meaning of
Words "with-
out Impeach-
ment," &c., re-
stricted.

5. In some cases, the generality of the clause "without impeachment of waste" is specially limited. Thus, a man made a lease, "*absque impetitione vasti, proviso quod non prosterneret domus voluntarie,*" an action of waste was brought, because the tenant had voluntarily prostrated houses. It was objected, that the lessor's only remedy was by covenant, because the subsequent proviso could not alter the general nature of the lessee's estate created by the words "*absque impetitione vasti;*" but it was decided, that the latter words clearly had an effect on the lessee's estate, and that he was only a qualified and imperfect tenant without impeachment of waste.^c

In another case,^d where an intention was manifested to use the words "without impeachment of

^a 2 Freeman, 55. Lady Evelyn's case, 2 Swanst. 172.

^b Bishop of London v. Webb, 1 P. Wms. 527.

^c 9 Hen. VI. 35, pl. 6. Plowd. 135.

^d Aston v. Aston, 1 Ves. 264.

waste" in a restricted sense, the tenant was enjoined from cutting timber generally. Sir Thomas Aston settled lands to himself for life without impeachment of waste, with full liberty to commit waste, and settled a jointure on his wife without impeachment of waste; and further created a term, in trust, out of the rents and profits to raise money to reimburse his wife her expenses of repairing the jointure estate. Lord Hardwicke inferred, from the diversity of expressions used, that the settlor thought there was some difference between the power he would have over his lands, and the power his wife would have over her jointure estate, and that it was absurd to suppose that he intended to allow her to cut down and strip the estate of every stick of timber (which were the natural botes for repairs), and then to come to be reimbursed her expenses in buying timber for repairs out of the trust term; that the plain intent was, she should be tenant for life without impeachment of waste, to prevent trouble in little matters, and should be reimbursed out of the term what she should pay from her own pocket; and as she had cut down timber without applying it to repairs, she should have no benefit of the term till she had reimbursed the estate for what she had so unreasonably cut away, and should be enjoined from cutting any more timber in future without leave of the Court.

Where a party was tenant for life without impeachment of waste, except as to timber growing in the park, avenues, demesnes, lands, and woods adjoining to the capital messuage, it was held that the exception did not increase his powers, so as

to enable him to cut timber in woods not precisely answering the description in the exception, but which were an ornament and shelter to the mansion-house.^a

Remedy for
equitable
Waste.

6. The remedy for equitable waste is either by injunction to restrain the particular tenant from committing it, or by a bill for compensation against the particular tenant, or his representative, where his estate has been benefited by the waste. The remainderman, if he has not acquiesced in the waste, may file a bill for compensation at any time within twenty years after the death of the tenant for life. He is not barred by lapse of time during the lifetime of the tenant for life by analogy to the provision of the Statute of Limitation, which reserves to a party entitled to take advantage of a forfeiture a right of entry when his estate vests in possession.^b

Where equitable waste has been committed under a mistake as to the powers given by an ambiguous will, the guilty party will not be condemned in costs, or decreed to pay interest on the proceeds of the waste.^c

^a Newdigate v. Newdigate. 8 Bligh, 734. 2 Clark v. Fin. 801.

^b Duke of Leeds v. Earl Amherst, 2 Phil. 117.

^c Newdigate v. Newdigate, 1 Jurist, 636.

CHAPTER IV.

DILAPIDATIONS BY MORTGAGEE OR MORTGAGOR.

1. Obligation on Mortgagee to repair.—2. Right to alter or rebuild.—3. Reimbursement of Expense.—4. Right of Mortgagee to Timber and Minerals.—5. Right of Mortgagor to Timber.

1. A MORTGAGEE, who in equity is considered as holding the land as a pledge for the payment of his debt, is bound to preserve the premises from extraordinary dilapidations; and if, by his neglect, the premises become deteriorated in value, the Court of Chancery will compel him to reinstate them. Where a mortgagee had burned wainscot and committed other waste, the Court ordered him to deliver up possession, the mortgagor giving security to pay what should be found due upon account.^a And a mortgagee was held liable for the damages occasioned by his pulling down two cottages on the property.^c But for that depreciation which is caused by gradual decay, the mortgagee is not responsible. For instance, where the mortgagee had been in possession forty years, and the premises were out of repair, and had decreased in value from £22 to £18 per annum, and it appeared that the mortgagee had

Obligation on Mortgagee to repair.

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^a Godfrey v. Watson, 3 Atk. 516.

^b Hanson v. Derby, 2 Vern. 392.

^c Sandon v. Hooper, 6 Beav. 246.

done some repairs, the Court thought that the premises were in as good a condition as could be expected, considering the lapse of time.^a And where the mortgage is of mines, the mortgagee is only bound to use them as a prudent owner would: he cannot be compelled to expend money in speculative improvements.^b

Right to alter
or rebuild.

2. Although, generally speaking, a mortgagee has no right to alter the mortgaged tenements, yet he may pull down ruinous houses, and build better ones, to prevent a forfeiture.^c

Reimburse-
ment of Ex-
pense.

3. He is entitled to be allowed for repairs necessary for the support of the property, and for the expenses of doing that which is essential to the maintenance of the mortgagee's title. But he will not be allowed monies expended in increasing the value of the property, unless the mortgagor has consented or acquiesced.^d If he has improved the property with the consent of the mortgagor, he is entitled to be reimbursed the monies expended, with interest, in the same manner as if it was a new loan.^e

Right of
Mortgagee to
Timber and
Minerals.

4. The mortgagee in possession has no right to cut down timber; and if he do so, an injunction will issue to restrain him from cutting any more, and he will be ordered to account for that already felled; the produce to be applied, in the first place, to the satisfaction of the interest, and afterwards to the liquidation of the mortgage debt.^f But where

^a Russell v. Smithies, 1 Anst. 96.

^b Rowe v. Wood, 2 Jac. and Walk. 553.

^c Hardy v. Rees, 4 Ves. 480.

^d Sandon v. Hooper, 6 Beav. 246.

^e Marrell v. Beckford, 1 Mad. 281.

^f Farrant v. Lovel, 3 Atk. 723.

the land is an insufficient security, it seems that the mortgagee may sell the timber.^a He cannot open and work mines, or take brick earth; if he does, he is chargeable with the gross receipts, and not allowed any of the expenses.^b

5. The mortgagor cannot cut down timber to the prejudice of the security; and therefore if it appear that the security is scanty, equity will restrain him from felling timber,^c but not unless it be clearly shown that the security is deficient, the presumption being that it is not.^d If he have cut down timber to the prejudice of the security, and sold it, he will be ordered to pay the amount into Court, in trust for the mortgagee.^e Underwood, which is in the nature of a crop, the mortgagor will not be restrained from cutting at seasonable times, and this though the underwood be expressly mentioned in the mortgage. But where the mortgagor becomes bankrupt, his assignees will be enjoined from taking even underwood, because the mortgagee is entitled to the land in exactly the same plight as it is at the date of the bankruptcy, and to prove for the residue of his debt.^f After a decree in a foreclosure suit, the mortgagor will be restrained from committing waste, and this although the bill does not pray an injunction.^g

Right of Mortgagor to Timber.

^a Withrington v. Banks, Sel. C. Chan. 31.

^b Thorneycroft v. Crockett, 12 Jurist, 1081.

^c Humphries v. Harrison, 1 Jac. and Walk. 581.

^d Hippealey v. Spencer, 5 Mad. 422. King v. Smith, 2 Hare, 239.

^e Fairfield v. Weston, 2 Sim. and Stu. 96.

^f Hampton v. Hodges, 8 Ves. 105.

^g Goodman v. Kine, 8 Beav. 379.

CHAPTER V.

DILAPIDATIONS BY JOINT TENANTS, AND TENANTS IN COMMON.

1. Obligation of joint Tenants, and Tenants in common.—2. Repairs of Houses.—3. Cultivation of Lands.—4. Improvements of common Tenement by Tenant.—5. Injuries thereto.—6. Action of Waste.—7. Injunction.

Obligation of
joint Tenants,
and Tenants
in common.

1. IN all the preceding cases the tenant had an exclusive right of possession, but limited as to duration, and his obligation to repair resulted from that limitation. The right of a joint tenant or tenant in common is limited in present enjoyment, since he possesses the land concurrently with his co-tenants. His obligation as to the manner of using the lands is, that he shall not interfere or prejudice the right to use of his companion, and his companion is under the same obligation towards him. It is obvious, therefore, that any act of misuser or voluntary waste by one tenant in common is injurious towards the others. It is also obvious that he cannot be responsible to his co-tenants for permissive waste, since all the tenants, having an equal right to possess, are equally able to repair the decay or prevent the ruin of the common tenement, and such decay

or ruin is not more the default of one than of all. The only way in which one can be liable to the other in respect of the gradual or accidental dilapidation of the tenement, is to contribute towards the repairs.

It is the interest of the tenants in common or joint tenants (assuming their tenancy to be in fee) that the tenements should be in the best possible condition; and such being their interest, it is the duty of each to the other to bear his proportion towards the charge of maintaining the tenements in that state of repair. If they have only a limited interest, for life or years, in the joint or common tenement, then it is their duty to their lessor to keep the tenements in tenantable or ordinary repair; and therefore, *à fortiori*, the duty of each of the tenants to his companion to contribute his share of the expenses of doing such repairs. Where the estates of tenants in common are different in degree, as if one have the fee and the other hold in common with him for years, there their respective interests and duties with regard to dilapidations will differ with their estates: thus, he who had the fee can only call upon the tenant for years for contribution towards tenantable repairs; and if trees be felled or blown down, they become the property of the tenant who holds in fee.*

2. The owners of houses and mills are bound, *pro* Repairs of Houses. *bono publico*, to repair and uphold them, because they are for the habitation and use of mankind; and therefore, where there were two tenants in common,

* West v. Passmore, B. N. P. 35.

or joint tenants of a house or mill, and it fell into decay, and one was willing to repair, and the other was not, he who was willing had, by the common law, a writ de reparatione faciendâ against his co-tenant.^a The writ commanded the Sheriff to summon the unwilling tenant to show cause wherefore, although he and the plaintiff held the mill in undivided moieties, and received the profits thereof in equal portions, and were bound to repair and uphold the mill; and although the defendant had received his share of the profits, he had refused to contribute to the reparation and support of the mill, to the great damage and injury of the plaintiff.^b But if parties are joint tenants of a wood, or arable land, one has no remedy against the other to make enclosure or reparations for safeguard of the wood or corn.^c

From the above form of writ, taken from Fitzherbert, it would seem that the action was only maintainable when the defendant had received his share of the profits of the house or mill. It should be mentioned that Lord Coke states the above writ to be applicable to the case of two joint tenants, or tenants in common, of a house or mill. Fitzherbert says, where there are three tenants in common, or joint or pro indiviso of a mill or a house, and which falls to decay, and one will repair, and the others will not repair the same, he shall have this writ against them. The form of the writ given by him is for one against two.

^a Co. Lit. 200 b. ; 54 b. ^b F. N. B. 127, A. B. (295.)

^c Lewis Bowles' case, 11 Rep. 82 b.

Although this writ could not be issued at the present day, since, if not taken away by 3 & 4 Wm. IV. c. 27, which probably it is not, as it is not expressly mentioned in the statute, and does not seem to have been an action real or mixed, it was abolished by 2 & 3 Wm. IV. c. 39, which provided process for the commencement of all personal actions; it establishes the mutual obligation between joint tenants and tenants in common to contribute to the reparation and support of houses and mills. An action on the case would now be considered the appropriate remedy for one tenant in common against another in a case where, having received his share of the profits of the house or mill, he had refused to contribute towards its reparation, and the house in consequence had fallen into decay.

In equity, if one joint tenant sues for a partition, and it appears that money has been laid out in substantial improvements, the Court will not decree a partition until an account has been taken and allowance made.*

3. As to the cultivation of land, it has been seen Cultivation of Lands. that the duty of tenant for years in this respect is not a common law obligation, but founded on a contract implied from the supposed object in demising the lands. If one tenant in common alone cultivate the common land, of course he is entitled to reap the harvest, and is only accountable to his companion for the balance of profit. There is no reason why one tenant in common should be en-

* Swan v. Swan, 8 Price, 518.

titled to call upon his companion to join him in the cultivation of lands; it is not like the case of a building, the expenditure in the repairs of which often very far exceed the immediate accruing profits.

Improvements
of common
Tenement by
Tenant.

4. A tenant in common has, without the consent of his co-tenant, a perfect right to do any repairs, and make any improvements to the common property he may deem advisable; in short, to do any act which has a tendency to preserve or make it profitable;^a though he can only require his co-tenant to contribute towards those reparations which are necessary to prevent the tenement from depreciating in value.

Injuries there-
to.

5. If, however, a tenant in common destroy or do any act to depreciate the thing held in common, his co-tenant may have an action against him. Thus, if a dove-house be held in common, and one of the tenants destroy the whole flight of doves; or if the common tenement be a park, and he destroy or diminish the stock of deer; or if there be a river in common, and one of the tenants corrupt or divert the water,—the other tenant may have an action of trespass or on the case; trespass, if the tenement be totally destroyed, as in the instance of the dove-house; or case, if it be only injured, as in the instance of the river.^b And if one of several tenants in common of houses pull them down, and make a railway on their site, it is an ouster which entitles

^a Vide *Fennings v. Lord Grenville*, 1 Taunt. 241.

^b Co. Lit. 200 a, b. *Cubitt v. Porter*, 8 B. and C. 257. *Bradbee v. Christ's Hospital*, 4 M. and G. 761.

the other tenants to maintain ejectment.* And again, if two parties be tenants in common of a tree, and one fell the tree, the other may have an action for the special damage;† but if a tenant in common of land cut down timber trees growing thereon, of a proper age and growth to be cut, such is nothing more than taking the fair profit of the estate, and his co-tenant cannot maintain an action against him as for a wrongful act, though he may compel him to account for the value of the timber.‡

6. At common law, an action of waste was not sustainable between joint tenants or tenants in common. But the statute of Westminster, 2. 13 Edw. I. c. 22, provided that when two or more held a wood, turbary, or fishery, in common, wherein no one knew his several part, and one did waste against the will of another, an action should lie by writ of waste; and when it should come to judgment, the defendant should elect either to take his part in a place certain, by the Sheriff, the view, oath, and assignment of the neighbours for that purpose sworn and chosen, or he should agree to take nothing in the wood, turbary, or other thing, except what his co-tenants were willing that he should take; and if he elected to take his part in a place certain, the part wasted should be assigned for his part, as it was before he did the waste. Action of Waste.

This Act did not extend to castles, houses, or other places for the habitation of man, because

* Doe d. Wawn v. Horn, 3 M. and W. 333; 5 M. and W. 564.

† Waterman v. Soper, 1 Lord Ray, 737.

‡ Martyn v. Knowllys, 8 D. and E. 145.

there was a sufficient remedy for the reparation of them by writ of *reparatione faciendâ*. It only extended to tenants of the freehold, the term tenant having that import. A parson who in right of his church was tenant in common with another was entitled to a writ of waste on this statute for a partition.^a It did not extend to coparceners, because they were compellable to make partition. Any act which would have been waste by a tenant for life entitled a tenant in common to a partition under this Act.

The defendant was to elect either to take his part in certain, and the place wasted as part, (that is, if the place wasted was not more than his share; if he had wasted more than his part, he could only have part of the place wasted,) or to find surety to take no more than belonged to his part.^b

This writ is abolished by 3 & 4 W. IV. c. 27; but the statute and Lord Coke's comment upon it show the right to a partition in the case of waste by a tenant in common, and the principles upon which such partition should be made. As there is now no common law proceeding by which such a partition can be effected, the remedy must be sought in equity.

Injunction.

7. An injunction will not be granted to one joint tenant or tenant in common against his companion, unless it be to prevent destructive and malicious waste, or the party in possession hold the moiety of the tenements as tenant of the applicant;^c and where tenants in common, entitled to five-sixths

^a F. N. B. 49. I. (114).

^b 2 Inst. 403, 404.

^c Hole v. Thomas, 7 Ves. 589. Twort v. Twort, 16 Ves. 128.

of certain lands and buildings, leased them to a Railway Company, who pulled down the buildings and made a railway over the land, the party entitled to the other sixth, as tenant in common, dissented from the lease, and recovered in ejectment against the Company, the Court of Chancery refused to enjoin him from destroying the Company's works, because the premises had been altered without his consent, and he was entitled to restore them to their original state.*

* *Durham and Sunderland Railway Company v. Warren*, 4 Beavan, 119.

CHAPTER VI.

DILAPIDATIONS OF PARTY WALLS AND FENCES.

1. Property in Party Walls.—2. Property in Fences.—3. Obligation to repair Fences.—4. Extinction of Obligation by Unity of Possession.—5. Who bound to repair.—6. Injuries resulting from Dilapidations of Fences.—7. Who to complain of Dilapidations.

Property in
Party Walls.

1. WHERE a party wall exists between two buildings or gardens, which is used by the occupiers of both buildings indiscriminately, and it does not appear on whose land it was built, the presumption is that the parties are tenants in common of the wall. The presumption of property arising from acts of ownership must correspond with those acts; and, as in the case of a party wall, each party equally makes use of the whole wall, the inference is that they are equally entitled to the whole wall. It follows that if one party build against the wall on his side, no action can be maintained by the other. And if one pull down the wall for the purpose of rebuilding it, or heighten it, it is not a trespass against his neighbour; but the neighbour may have an action on the case for the temporary loss of the protection of the wall, or for any injury he may sustain from the increased height, or he may pull down any additional erection upon the wall. But if one of the parties totally destroy the

wall, not for the purpose of rebuilding it, an action of trespass will lie at the suit of the other.^a And one tenant in common of a hedge may have trespass against his co-tenant if he grub it up, but not if he merely clip it.^b Whether a party wall standing between two houses belong half to the owner of one house and half to the other, or is the common property of both owners, one has no right to underpin any part of the wall, unless he can do it without injury to the house of the other.^c

The rebuilding and repairs of party walls within London and a limited district around, are regulated by the Metropolitan Buildings Act,^d by which the owner of one of the houses separated by the party wall may, under the superintendence of a district surveyor and official referees, rebuild or repair the party wall when necessary, either with or without the consent of the owner of the other house, and recover contribution from other parties benefited by the works. As this statute is of itself a book, and there have been as yet no legal decisions on its provisions, this general reference to it must suffice.

In the case of a party wall out of the limits of the Building Act, the rights and liabilities of par-

^a *Cubitt v. Porter*, 8 B. and C. 257. *Wiltshire v. Sidford*, 8 B. and C. 259, n. See *Murly v. M'Dermott*, 8 A. and E. 138.

^b *Voyce v. Voyce*, Gow. 201.

^c *Bradbee v. Christ's Hospital*, 4 M. and G. 761.

^d 7 & 8 Vict. c. 84, amended by 9 & 10 Vict. c. 5. The former Acts were 19 Car. II. c. 3; 6 Anne, c. 31; 7 Anne, c. 17; 11 Geo. I. c. 28; 33 Geo. II. c. 30; 4 Geo. III. c. 14; 6 Geo. III. c. 27; 12 Geo. III. c. 73; 14 Geo. III. c. 78; 50 Geo. III. c. 75.

ties with respect to the repairing or rebuilding it will be the same as those of tenants in common, if they are tenants in common of the party wall. If half the wall belongs to each party, then each may repair or rebuild his part.

The late Building Act (14 Geo. III. c. 78) did not make the owners of houses between which a party wall stood tenants in common of the party wall, but each owner had legal possession of half the wall, and an easement for the support of his house in the other half. Therefore one was entitled to maintain trespass against the other for pulling down so much of the wall as stood upon his land.^a

It did not confer any authority to one man to build half the side wall of his house on his neighbour's land,^b nor did it authorize him to raise a party wall so as to darken his neighbour's lights.^c

And where a man having built a house leased the adjoining land to another for building purposes, it would seem that the lessee had no right under the Building Act to use the wall of the house next to the land leased to him as a party wall.^d

A tenant under a general covenant to repair was not bound to contribute to the expense of rebuilding a party wall under the former Building Act, because such rebuilding was a new work, the liability to contribute towards which was imposed by statute.^e

^a *Matts v. Hawkins*, 5 Taunt. 20.

^b *Barlow v. Norman*, 2 W. Bl. 250.

^c *Titterton v. Conyers*, 5 Taunt. 465. *Wells v. Ody*, 1 M. and W. 452.

^d *Williams v. Pocklington*, 2 B. and Ad. 878.

^e *Moore v. Clarke*, 5 Taunt. 90. See *Sangster v. Birkhead*, 1 B. and P. 303.

It was otherwise if he covenanted to bear, pay, and allow a reasonable share and proportion towards supporting, repairing, amending, and cleansing all party walls;^a and the provisions of the statute as to contribution towards rebuilding a party wall only applied to cases in which the parties themselves had made no agreement.^b

The above cases are mentioned because they may be applicable to the construction of the present Building Act.

2. In the case of a fence between two fields, <sup>Property in
Fences.</sup> which has a ditch at its base, the presumption is that the fence belongs to the party on whose side the ditch is not. It is reasonable to suppose that, in making the fence by the party who made it, the ditch was dug on the verge of his own land, and the earth thrown up on his land, so as to form a bank on which to plant the fence.^c And thus, the outer bank of the ditch furthest from the hedge is presumed to be the boundary of the lands; and if the party to whom the fence belongs proceeds to widen the ditch, it is *primâ facie* a trespass on the neighbour's land.^d Where there are ditches on both sides the hedge, or where there is no ditch at all, the proprietorship of the hedge may be proved by acts of ownership; and if both parties have equally exercised acts of ownership, the right of property will, I apprehend, be presumed to be common.

^a *Barrett v. Duke of Bedford*, 8 D. and E. 602.

^b *Stuart v. Smith*, 2 Marsh, 435; 7 Taunt. 158. *Williams v. Pocklington*, 2 B. and Ad. 878.

^c *Guy v. West*, 2 Sel. N. P. 1287.

^d *Vowles v. Miller*, 3 Taunt. 137.

Obligation to
repair Fences.

3. A tenancy in common in a party wall or fence does not imply any obligation in one tenant towards his companion to repair such wall or fence, nor does the existence of a fence on a man's land impose on him any obligation to repair it as against his neighbour.

Every man is bound by law to prevent his cattle from trespassing upon the land of his neighbour;^a and therefore, if he make a fence, it may be presumed that he made it for the purpose of keeping his cattle on his own land, and not for the benefit of his neighbour. But by special agreement, or by prescription, one of two adjoining landholders may be bound to repair the fence between the lands. This right of one landholder to the protection of a fence on the land of his neighbour, is in the nature of an easement upon the neighbour's land; and therefore, if claimed by grant, the grant should, it would seem, be by deed;^b if by prescription, then it should be proved that the fences had always been kept in repair by the occupiers of the land sought to be charged for twenty years, which will raise a presumption of liability, capable of being rebutted by proof, that the parties whose tenants repaired were under the disability of infancy, lunacy, or coverture, or were merely tenants for life; but if it be proved that repairs have been uniformly done for forty years, the prescription will be conclusive.^c Although the existence of a fence, which has been kept in good repair by one party for the period of

^a Churchill v. Evans, 1 Taunt. 529.

^b Hewlins v. Shippam, 5 B. and C. 221, post, c. 10.

^c 2 and 3 Wm. IV. c. 71.

twenty or even forty years, does not of itself imply a duty on his part towards the neighbouring occupier so strongly as may be inferred from the fact of repairs done, upon the requisition of the neighbour, to a hedge which has not existed for twenty years; yet it would seem, by the operation of the statute 2 and 3 Wm. IV. c. 71, that no presumption as to the obligation to repair a fence can be made, unless it be proved that a fence has existed for twenty years; and that where it is proved that the lands have been fenced for twenty years, it will be *prima facie* sufficient to charge the proprietor of the fence with the repairs.

4. The obligation to repair fences will be extinguished by unity of possession,—that is, where the party bound to repair the fence becomes entitled to the fee simple of the lands on both sides of the fence. The very essence of an obligation is, that there should be an obligee or a party entitled to exact performance, and a man can be under no obligation to keep one parcel of his land separate from another.^a If A. be bound to enclose against B., and purchase one acre of B.'s land contiguously to the enclosure, his obligation is extinct.^b By this unity of possession of both the closes, the obligation to repair is absolutely extinguished, and therefore does not revive, though the party afterwards convey away one of the closes.^c The obligation and the right, however, are annexed to the fee simple of the lands to which they respectively belong;^d and

Extinction of
Obligation by
Unity of Possession.

^a Boyle v. Tamlyn, 6 B. and C. 337.

^b F. N. B. 299, n.

^c Boyle v. Tamlyn, 6 B. and C. 337.

^d Star v. Rookesby, 1 Salk. 336.

therefore a unity of possession under a lease for years, or for any estate in either less than a fee simple, will suspend merely, and not destroy, the obligation.* Though, during such temporary unity of possession, the fence dividing the lands of two freeholders may have been kept up by the occupier, yet, as the fence could not have been repaired from any legal obligation to prevent cattle from straying from the one close into the other, the period of the unity of possession cannot be reckoned in the prescription.

Who bound to
repair.

5. Though the obligation to repair be annexed to the fee simple of the land, yet the party bound to do the repairs is the actual occupier, he being the person whose immediate duty it is to prevent cattle from straying from one close into the other; and having the exclusive possession of the fence, he is the only person who can lawfully repair it, or who can be presumed to know of the defects. A party, therefore, entitled to the reversion in the lands is not liable to an action at the suit of the neighbour for non-repair of the fences,^b unless he expressly agree with his tenant to repair.^c

Injuries re-
sulting from
Dilapidations
of Fences.

6. Where the obligation to repair fences exists, if any damage occur to the cattle of the occupier of the land, who has the right to the protection of the fence, by reason of defect of the fences, the obligor is liable to make compensation: as if the cattle stray through the opening of the fence, and are lost or injured, or if they trespass on the lands of a third

* Co. Lit. 114 b.

^b Cheetham v. Hampson, 4 D. and E. 318.

^c Payne v. Rogers, 2 H. Bl. 349.

person, and the cattle owner is thereby damnified.^a Where the plaintiff's horse strayed into the defendant's field through a defect in the fence, and was killed by the falling of a haystack, it was held that the damage was not too remote, but might be attributed to the defendant's neglect in not repairing the fence.^b And not only for injuries happening to the cattle of the occupier of the close, entitled to the fence, but also for injuries to the cattle of other parties, being lawfully in that close, is the obligor liable to make compensation.^c And if cattle in the obligor's close escape into the adjoining close, it may be laid as a consequence of the dilapidations of the fence, though for this he may likewise be liable in trespass.^d If the cattle of the obligee escape into the obligor's close, the trespass is excusable, nor can they be distrained damage feasant,^e nor can the obligor chase them into a highway or other close;^f but if the obligor give the cattle owner notice, and he suffer them to continue there after such notice, they may be distrained, or an action of trespass maintained for such continuance.^g Cattle which have escaped into a close, through defect of fences which the occupier is bound to repair, cannot be distrained by the lessor for rent, unless the owner, after notice, neglect or refuse to drive them away; but the grantee of a rent charge may distrain them

^a 1 Vent. 265.

^b *Powell v. Salisbury*, 2 Y. and J. 391.

^c *Rooth v. Wilson*, 1 B. and Ald. 59,

^d *Star v. Rookesby*, 1 Salk. 385.

^e 2 Rol. Abr.-585, pl. 3. Com. Dig. Trespass.

^f *Carruthers v. Hollis*, 8 A. and E. 113.

^g 2 Wms. Saund. 285, n. 4.

after they have been levant and couchant upon the land, without giving notice to the owner, because such grantee has nothing to do with the fences, as has the landlord.*

Who to complain of Dilapidations.

7. The obligation to repair is only towards the occupier of the adjoining close, and not general, as against the public; and therefore a party seeking to take advantage of that obligation, either as excusing a trespass, or charging the obligor for injuries happening to his cattle, must show an interest in the adjoining close, or a right to have his cattle there. For instance, where the plaintiff in replevin endeavoured to excuse the trespass of his cattle into the land of the distrainer, by reason of the defect of fences by the side of a public highway, which the distrainer was bound to repair, it was held that he ought to show that he was lawfully using the highway at the time his cattle escaped;^b and if the field of John be separate from that of James by a fence which John is bound to repair, and the field of Peter lie contiguous to that of James, and Peter's cattle escape out of his field through James's into John's by reason of the defective fence, John may distrain the cattle, or bring trespass against Peter; but if there be a fence between the fields of James and Peter, which James ought to repair, and that fence is also dilapidated, then, according to the better opinion, the trespass of Peter's cattle on John's land is excused; because, although John be not bound to enclose as against Peter, yet if he could distrain or

* Poole v. Longueville, 2 Saund. 290, s. 7. Jones v. Powel, 5 B. and C. 647.

^b Dovestone v. Payne, 2 H. Bl. 527.

bring trespass, Peter could recover against James, and James could recover against John ;^a and by adjudging the trespass of Peter's cattle to be excusable, this circuity of action is avoided.

^a F. N. B. 298, Hale's notes. Bac. Abr. Trespass, G. cont.

CHAPTER VII.

DILAPIDATIONS OF CHURCHES.

1. Who bound to repair.—2. Chapels not rateable.—3. Occupiers.—4. Exemptions of Parson and Founder;—5. Of Inhabitants of Chapelry.—6. Individual liable by Custom.—7. Rebuilding Church.—8. Things necessary for Divine Service, Ornaments, &c.—9. Manner in which Church to be kept.—10. Alteration in Church.—11. Monuments.—12. Repairs of Chapels, &c.—13. District Churches.—14. Obligation to make Church-Rates.—15. Retrospective Rate.—16. Visitation of Archdeacons, &c.—17. Insufficient Rate.—18. Mandamus.—19. Proceeding where Payment refused.

Who bound to
repair.

1. CHURCHES and churchyards are to be repaired by the parishioners, because they have the whole beneficial use of them, though the freehold and general right of property is in the parson.* The obligation to repair the church is a charge upon the person in respect of the land, &c., which he occupies in the parish; and a party occupying land in a parish, but residing elsewhere, is liable to contribute, for in judgment of law he is an inhabitant and parishioner, and has all the rights of a parishioner. And, although it was objected, that as he resided out of the parish, he had no occasion to use, and derived no benefit from, the church and churchyard, yet that circumstance, it was held, ought not

* 2 Inst. 489, 653. Degge, 170.

to exonerate his lands, and cast a greater burden upon the other parishioners; and besides, as the uses to which the church and churchyard are applied, viz. religious instruction and interment, are of general benefit to all, every one ought rateably to contribute towards their sustentation in proportion to his means, whether he himself directly partakes of those benefits or not.^a

It has been held that the Governor of Greenwich Hospital was rateable to the repairs of the church, although the hospital is part of an ancient royal demesne, and has an unconsecrated chapel, chaplains, and burying-ground attached thereto.^b The occupation of property rated to the repair of the church need not be beneficial.^c

2. An exception to this rule is introduced by ^{Chapels not rateable.} 3 and 4 Wm. IV. c. 30, by which no person is rateable towards the repairs of the church by reason of the occupation of a church, chapel, or place exclusively appropriated to divine worship. And by the 2nd section, if the edifice be occasionally used for Sunday or infant schools, or the charitable instruction of the poor, it will not lose its privilege.

3. The parties liable to repair the church are the ^{Occupiers.} occupiers, and not the proprietors of the land. In one case where a man took a lease of a stall in a market, which he used once a week to sell his wares, he was held not liable to church-rates.^d

4. The parson, as already stated, is exempt from ^{Exemptions of Parson and Founder;}

^a Jeffrey's case, 5 Rep. 66 b. Paget v. Crompton, Cro. El. 659.

^b Smith v. Keates, 4 Hag. 275.

^c Reg. v. Wilson, 4 P. and D. 130.

^d Anon. 4 Mod. 148.

liability for the repairs of the church, because he repairs the chancel.^a The founder of the church also may prescribe for himself and his tenants to be discharged by reason of the foundation. In such prescription he must show that he founded the church, and that he has never been rated to the repairs.^b

Of Inhabitants
of Chapelry.

5. The inhabitants of a chapelry also may prescribe to be discharged from contributing towards the repairs of the mother church, where they have never paid church-rates, nor made use of the mother church, but have always repaired their chapel, and had divine service and sacraments there administered, because this might have had a lawful origin, since the mother church might have become too small for the parishioners, and it might have been agreed that the inhabitants of the village should build themselves a chapel, and no longer overthrow the mother church.^c And such a custom, it seems, is good, though the inhabitants of the chapelry still enjoy the right of sepulture in the parish churchyard.^d But the mere existence of a chapel, which is repaired by the inhabitants of the chapelry, will not

^a Degge, 175, ante, p. 16. In Reg. v. Nevill, 8 Q. B. 452, a vicar was held not rateable in respect of his tithes under an Act for rebuilding a church, imposing a rate on every occupier of a house or other *tenement*. In Reg. v. Barker, 6 A. and E. 388; 1 N. and P. 503, tithes were held rateable under an Act of Parliament differently worded.

^b Degge, 175.

^c Brown v. Palfrey, 2 Lev. 102. Wise v. Creeke, 2 Lev. 186. Ball v. Cross, 1 Salk. 164. Craven v. Sanderson, 7 Ad. and El. 880.

^d Wise v. Creeke, 2 Lev. 186. Ball v. Cross, 1 Salk. 164, cont.

of itself exempt them from the repairing the mother church, unless they have never been rated to such repairs; because it will be presumed that the chapel was erected for the ease and convenience of the inhabitants of the chapelry, and not for the ease of the frequenters of the church.^a It must be proved not only that the inhabitants have never been rated to the repairs of the mother church, but also that they have been rated to the repairs of their chapel; the mere fact that the chapel has always been kept in repair, without coming upon the parish at large, is not sufficient.^b

The inhabitants of a chapelry may also prescribe in discharge of church-rates by way of modus, as that they have, time out of mind, paid 3s. 4d. towards the repairs of the mother church, or have, at their own charge, repaired a certain part of the mother church.^c But a prescription to be exempt from church-rates because they have been immemorially used to repair part of the fence of the churchyard, has been held to be unreasonable and void.^d

6. By custom, also, an individual or a corporation may be liable to repair the church, and then, of course, the inhabitants are not liable in the first instance.^e But there can be no valid custom to cast the burden of repairing the church upon a particular class of inhabitants, as upon the occupiers of

^a Ball v. Cross, 1 Salk. 164. Godfrey v. Eversdon, 3 Mod. 264.

^b Craven v. Sanderson, 4 Ad. and El. 666.

^c Hob. 67.

^d Noy. 41.

^e Per Lord Kenyon, B. R. T. 30 Geo. III. Woodfall, 872, 7th edit.

Rebuilding
Church.

arable land, because no reasonable origin of such a custom can be supposed.^a

7. It appears to have been ruled by Holt, C. J., in one case,^b that there might be a suit in the Spiritual Court for the non-payment of a tax assessed for the repairs of a church, but not for building a church. In a previous case^c it was decided, that if a church be so much out of repair that it is necessary to pull it down, and it cannot be otherwise repaired, upon a general warning given to the parishioners, the major part of the parishioners present at a meeting so convened may make a rate for pulling down the church to the ground, and building it upon the old foundation, and for making vaults where they are necessary. And that if the parish increase so that it is necessary to have a larger church, the parish may raise a tax for enlarging it, as well as repairing it. It was said at the bar, that where a tax was made for enlarging the church, the consent of every parishioner must be had, but the Court were of another opinion.^d And in this case a prohibition to the Ecclesiastical Court was refused by the Courts of King's Bench, Common Pleas, and Exchequer. This last-cited case appears to have been better considered, and is certainly the most reasonable; for the law would be very defective, and but little consistent with itself, if, while it compelled parishioners to keep their church in substantial and perfect repair, it did not provide for

^a Andrews v. Hutton, Hetley, 133.

^b Churchwardens of St. Ann's, Westminster, 1 Lord Ray, 512.

^c St. Mary Magdalen, Bermondsey, 2 Mod. 222. 1 Mod. 236. S. C.

^d 1 Mod. 237.

the contingency of the church falling into entire ruin, which could hardly happen but from the culpable neglect of the parishioners themselves. The object of the law in providing for the repairs of churches is, that there may always be a place where divine worship may be performed, and religious instruction delivered.

8. Parishioners are not only bound to keep the church in repair, but also to provide things convenient and necessary for the performance of divine service, as books, vestments, &c.*

Things necessary for Divine Service, Ornaments, &c.

By the canons of 1603, the churchwardens are bound to provide, at the expense of the parish, a Book of Common Prayer, a Bible of the largest volume, and the books of Homilies allowed by authority.^b A font of stone is to be set up in every church and chapel where baptism is ministered, in the ancient and usual place, in which alone the minister is to baptize publicly.^c A convenient and decent table is to be provided for the celebration of the Holy Communion, and to be covered, in time of divine service, with a carpet of silk or other decent stuff, and with a fine linen cloth at the time of ministration. The Ten Commandments are to be set up at the east end of every church, where the people may best read the same, and other chosen sentences to be written on the walls, in places convenient. A convenient seat is to be made for the minister to read the service in.^d A comely and decent pulpit is to be set in a convenient place, and to be there seemly kept, for the preaching of God's

* Paget v. Crompton, Cro. El. 659. Jeffrey's case, 5 Rep. 67 a.

^b Canon 80.

^c 81.

^d 82.

word.^a A strong chest, with a hole in the upper part thereof, is to be set and fastened in the most convenient place, to the intent that the parishioners may put into it their alms for their poor neighbours.^b The table of the degrees of marriages prohibited is to be publicly set up in every church.^c

The parishioners are likewise required to provide bells with ropes, and a bier for the dead.^d Also a parchment book for registering baptisms, marriages, and burials;^e a surplice, with sleeves;^f also, fine white bread, and good wholesome wine, and a standing pot of pewter or other purer metal, for the Communion.^g

The expense of consecrating the church may be included in the church-rate,^h but not the minister's salary.ⁱ

As to matters of ornament, such as bells, seats, organs, a distinction has been made between inhabitants of the parish and occupiers of land not resident in the parish: it is said, that the non-resident occupiers are not rateable for ornaments.^k According to Sir Simon Degge,^l this is not law, because there would be great confusion in making several levies, one for the repairs of the body of the church, and another for the ornaments. The ordinary cannot compel parishioners to keep an organ in repair, such thing not being essential to the celebration of divine service.^m

^a Canon 83.

^b 84.

^c 99.

^d Lynd. 252, Winchelsea.

^e Canon 17.

^f 58.

^g 20.

^h Warner v. Gater, 2 Curt. 315.

ⁱ Still v. Palfrey, 2 Curt. 902.

^k Woodward's case, 3 Mod. 211. Anon. Winch, 53.

^l Degge, 173. 1 Bulst. 20.

^m Jay v. Webber, 3 Hag. 4.

The majority of the parishioners may make a rate for the purpose of adorning and improving the church, as to make rails, to raise the steps of the communion table; because, in order and decency, there can be no rule, but the degree must be left to the discretion of the parishioners.^a A rate for repairing church bells is good.^b

9. According to the 85th canon (1603), "the churchwardens are to take care that the church is well and sufficiently repaired, and so from time to time is kept and maintained; that the windows are well glazed, and the floors paved plain and even; and all things there in such orderly and decent sort, without dust, or any thing that may be either noisome or unseemly, as best becometh the house of God."^c Manner in which Church to be kept.

A monition was issued to churchwardens to repair and re-instate in its original form the church spire, which had been destroyed by lightning.^d

And they are also to take care that the churchyards are well and sufficiently repaired, fenced, and maintained with walls, rails, or pales, as has been accustomed.^e They cannot make a foot-path across the churchyard, though they act *bonâ fide* for the good of the parishioners.^f

The seats in the church ought to be regular, and of a moderate height, so that the behaviour of the parishioners may be the better observed. If in an

^a Newson v. Bauldry, 7 Mod. 69.

^b Smith v. Dixon, 2 Curt. 268.

^c Viscount Maynard v. Brand, 3 Phill. 501.

^d Canon 85.

^e Walter v. Mountague, 1 Curt. 259. ^f Marriott v. Tarpley, 9 Sim. 279.

inconvenient place, or too high, they may be removed with the consent of the ordinary,^a but not by the churchwardens of their own authority.^b They are the general property of the parishioners, and must be kept in repair by them; except where an individual is entitled to a pew by faculty or prescription, in which case he is bound to repair;^c and if he suffer the parish to repair it, he loses his right.^d The repairs of a pew which the members of a corporation had from time immemorial occupied and repaired, may be defrayed out of the borough fund.^e

Alteration in
Church.

10. No alteration can be legally made in a church or churchyard without the consent of the ordinary, such as erecting a gallery, monument, or tomb. Nor can a pew or seat be properly taken away without his consent. In short, nothing ought to be done to a church, save mere works of repair or restoration, without a faculty. The ordinary may order the removal of a superstitious picture,^f or stone altar.^g Although the ordinary has a discretion in refusing or permitting ornaments or alterations in a church, it is not an arbitrary but a prudent and legal discretion, subject to the supervision of the metropolitan; and therefore, where he refuses to allow a party to erect a monument in a church, an appeal lies to the archbishop of the province.^h And

^a 3 Phill. 170.

^b Jones v. Ellis, 2 Y and J. 265.

^c Degge, 177.

^d 1 Phill. 329.

^e Reg. v. Mayor of Warwick, 8 Q. B. 926.

^f Frances v. Ley, Cro. Jac. 366.

^g Faulkner v. Titchfield, 1 Robertson, 184.

^h Cart. v. Marsh, 2 Str. 1080.

it seems the ordinary may grant a faculty for a monument to be erected in a church without the consent of the rector.* A custom for churchwardens to set up monuments, without either the consent of the rector or the bishop, has been held bad. "It would," says Lord Ellenborough, "in effect be entirely to secularize the church."^b It is said that only the parson can grant licence for burying within the church, because the freehold of the church is in him.^c

11. The law favours the erection of tombs, monuments, and sepulchres for a deceased in a church, chancel, common chapel, or churchyard, provided it be done in a convenient manner, and so as it be not an hindrance to the celebration of divine service, because it is the last act of charity that can be done for the deceased, and displays a reverend regard and Christian hope of a joyful resurrection. The defacement of monuments is punishable at the common law; and he who erected the monument may have an action during his life for the injury thereto, and after his death the property is vested in the heir of the deceased.^d And where a person wrongfully removed a tombstone, and erased the inscription, the erector recovered in an action of trespass against him.^e And in another case, it was said that the coats of arms placed in any church cannot be beaten down or defaced by the parson, ordinary,

* *Bulwer v. Hase*, 3 East, 217.

^b *Beckwith v. Harding*, 1 B and Ald. 508.

^c *Frances v. Ley*, Cro. El. 367. Vide also *Bryan v. Whistler*, 8 B and C. 288.

^d 3 Inst. 202.

^e *Spooner v. Brewster*, 3 Bing. 136.

churchwardens, or any other; and if they be, the heir by descent, interested in the arms, may have an action upon the case.* But this must be understood as assuming that the arms were properly set up; for where Sir Thomas Bury set up his arms in the church of St. David's, without the consent of the bishop, it was held that the ordinary was the judge of what ornaments were proper, and might order them to be defaced.^b The churchwardens also are the guardians of the monuments in the church, and may maintain an action for defacing them.^c

The relatives of the deceased have a right to erect monuments to their memory, provided they are neither inconvenient to the celebration of divine service, nor inappropriate to the church. The bishop is the judge of their convenience and propriety. And where he has settled those preliminaries, the setting up the monument is no more in derogation of the parson's freehold than the right of the parishioners to attend divine service, which is the primary purpose for which the church is erected. All that is necessary to be observed is, to take care that this secondary right of erecting monuments does not interfere with the primary right of the parishioners.

The parson is invested with the legal property in the church and churchyard for the benefit of the parishioners, and they are entitled to use those places to worship God, and to bury and memorialize their dead. And thus things fixed to the freehold

* *Frances v. Ley*, Cro. El. 367.

^b *Palmer v. Bishop of Exeter*, 1 Str. 576.

^c Godb. 279. —

for that purpose do not become the property of the parson. The churchwardens have a special property in the bells, organ, seats, &c.; and if they are damaged, they alone, and not the parson, can bring an action against the wrongdoer. If the seats are removed, the churchwardens, and not the parson, are entitled to them.^a And so, if a tombstone be wrongfully taken away, the erector is considered so far to have the possessory right thereto, that he may maintain trespass.^b But if seats be wrongfully annexed to the church, the materials belong to the parson, the property in them acceding to his general right of freehold in the church.^c

12. Chapels of ease are to be repaired in the same manner as churches, by the inhabitants of the chapelry; but private chapels of course must be repaired by the owners.^d By 1 and 2 Wm. IV. c. 38, if a person build and endow a church, before he can have the right of nomination secured to him, he must provide a fund for the future repairs. Where churches are united, the obligation to repair is not altered at common law, but each parish must repair the church belonging to it, in the same manner as before the union. If one of the churches be taken down, the parishioners whose church is taken down are not liable to contribute towards the repairs of the church to which they are united.^e But by 4 Wm. and M. c. 12, where churches are united by

Repairs of
Chapels, &c.

^a Comp. Incumb. 382. Hadman v. Ringwood, Cro. El. 145, 179. Jackson v. Adams, 2 Bing. N. C. 402.

^b Spooner v. Brewster, 3 Bing. 136.

^c Degge, 178. Prideaux, 73.

^d 2 Inst. 489.

^e Hob. 67.

virtue of 17 Car. II. c. 3 (which was passed for uniting churches in cities and towns corporate), the parishioners of the parish whose church is demolished shall bear such proportion of the charges of repairs and ornaments as the archbishop or bishop who shall make such union shall direct, and in default they may be proceeded against in the same manner as if the church were their own parish church.

District
Churches.

13. By the statute 58 Geo. III. c. 45, the Act for building additional churches in populous parishes, a district church is to be repaired by rates raised within the district, in the same manner as parish churches are by parishes.^a And every district is deemed in law a separate and distinct parish for that purpose. Repairs of chapels, not made district churches, are to be done by the parishes in and for which the chapel is built.^b The district remains liable for the repairs of the mother church for twenty years after the consecration of the district church; and after that period, the parish church is to be repaired by that district to which it is peculiarly appropriated.^c They are liable to be rated as well for the expenses of worship in the mother church as for the repairs.^d And by a subsequent statute^e the surplus pew-rents of the district church may, with the consent of the Commissioners for Building Churches, be applied towards the repairs of such church.

The Commissioners may appoint a select vestry

^a Varty v. Nunn, 2 Curt. 877. Nunn v. Varty, 3 Curt. 352.

^b S. 70. ^c S. 71. ^d Chesterton v. Farlar, 1 Curt. 345.

^e 59 Geo. III. c. 134, s. 27.

for the district, for the care and management of the concerns of the church or chapel, and all matters relating thereto; and such select vestry are to appoint the churchwarden or chapelwarden, and to elect new members of the vestry as vacancies may arise by death, resignation, or departure from the parish.^a A select vestry so appointed has, it seems, power to make church-rates. But in order to exercise this or any other power, there should be a majority of the body present.^b

14. The nature and extent of the obligation to make church-rates has recently been much discussed, Obligation to make Church-Rates. and it has been decided,—That the law has cast on the parishioners the duty of repairing the church: on this point it leaves them no option. On the parishioners in vestry assembled it casts the duty and confers the privilege of determining whether any and what repairs are needed, whether the estimates be proper, what amount will be necessary, and what will be the just proportion in which the common burden shall be borne by individuals.^c That a church-rate can only be made by the *churchwardens* and *parishioners* in vestry assembled, the former term including the latter, if no other parishioners, after due notice, attend; and the latter term including occupiers not personally resident in the parish. When so assembled, the majority bind the minority and the whole parish.^d If the vestry refuse to make a church-rate, the churchwardens, after the vestry is

^a 59 Geo. III. c. 134, s. 30.

^b *Blacket v. Blizard*, 9 B. and C. 851.

^c *Goelling v. Veley*, 7 Q. B. 447, per Lord Denman. *Veley v. Burder*, 12 A. and E. 301, per Tindal, C. J. ^d 7 Q. B. 436.

dissolved, cannot make a rate of their own authority, notwithstanding the church may stand in need of repair.*

But if the majority of the vestry resolve that church-rates are unscriptural, that being a question which they have no legal power to determine, their votes are considered as thrown away, and they are considered as assenting to a church-rate made during the meeting of the vestry, by the minority; and a rate made by the minority is good.^b They may vote that the church does not require repair, or the estimate is extravagant, or the rate excessive; but they cannot vote that they are under no obligation to repair the church.

Previous to making a church-rate, the parishioners should be summoned to meet in vestry for that purpose. The summons need not be from house to house: a general summons is sufficient.^c The summons is by a written or printed notice, which is to be fixed on the doors of all the churches and chapels in the parish.^d It need only be fixed on the principal door of each church, or chapel of the established church,^e in which divine service is usually performed. It need not be fixed on a building, not a church or chapel, in which divine service is performed, or on a church or chapel in which service is not performed.^f A private parishioner

* *Burder v. Veley*, 12 A. and E. 233. *Veley v. Burder*, 12 A. and E. 265.

^b *Goaling v. Veley*, 7 Q. B. 406.

^c *Vent.* 367. *Reg. v. Dalby*, 3 Q. B. 602.

^d 1 Vict. c. 45.

^e *Hornchurch v. Pigott*, 6 Jur. 608.

^f *Ormerod v. Chadwick*, 16 M. and W. 367.

may give notice of convening a vestry to make a church-rate.^a

Upon affidavit that a parish church is out of repair, the Ecclesiastical Court will issue a monition for the churchwardens and parishioners to meet in vestry, on a day named, to make a rate.^b If they neglect to meet, they may be proceeded against as contumacious. But the Ecclesiastical Court cannot proceed against a parishioner for wilfully and contumaciously refusing to make a sufficient rate for the necessary repairs of the church,^c nor against a churchwarden for voting in vestry that church-rates are bad in principle and unjust, if it does not appear that the church is out of repair.^d

When a poll is demanded, the rate is good, though the poll was held in the town-hall, which was private property, unless it appear that some person was prevented voting in consequence. Eleven hours was considered a reasonable time for keeping open the poll in a parish in which 785 was the largest number who had ever voted on such occasions.^e

The rate is bad, if excessive;^f but errors capable of reformation do not affect its validity.^g Inconsiderable omissions are not regarded; as where property of the value of £200 was omitted, the whole

^a *Butt v. Fellowes*, 3 Curt. 680. *Reg. v. St. Clement's*, 12 A. and E. 177. ^b *Fielding v. Cook*, 2 Curt. 663.

^c *Francis v. Steward*, 5 Q. B. 984. *Steward v. Francis*, 3 Curt. 209. ^d *Cooper v. Wickham*, 2 Curt. 303.

^e *Baker v. Wood*, 1 Curt. 507.

^f *Smith v. Dixon*, 2 Curt. 268.

^g *Hawes v. Pellatt*, 2 Curt. 476.

rateable property being £8622.^a It may be made on the same assessment as the poor-rate.^b

The rate may be drawn up after the vestry,^c and the heading may be inserted after the rate has been made.^d

Retrospective
Rate.

15. The churchwardens must, before they expend money in repairs, consult the parishioners as to the amount required, and obtain their consent. A retrospective church-rate, to reimburse churchwardens, is illegal. If such a rate were legal, one class of inhabitants might be called upon to pay for repairs, which it was the duty of another class to have done.^e If, however, the rate does not on the face of it purport to be retrospective, it will be good.^f

If a churchwarden order repairs to be done upon credit, he is individually liable: he has no authority to pledge the credit of his co-churchwarden.^g

By 59 Geo. III. c. 134, churchwardens, with the consent of the vestry, the incumbent, and the bishop, may raise money upon the credit of the rates for the repairs of the church; and in such case they are required and empowered to raise by rate a sum

^a White v. Beard, 2 Curt. 480.

^b Smith v. Dixon, 2 Curt. 268.

^c Scales v. Veley, 5 Jurist, 1017.

^d White v. Beard, 2 Curt. 480.

^e Tawnay's case, 2 Lord Ray. 1009. Dawson v. Wilkinson, And. 11. Rep. Temp. Hard. 312. Rex v. Chapelwardens of Haworth, 12 East, 556. Farlar v. Chesterton, 1 Curt. 345; 2 E. F. Moore, 330. Ellis v. Griffin, 2 Curt. 673.

^f Rex v. Sillifant, 4 A. and E. 354; 5 N. and M. 640. See Butt v. Fellowes, 3 Curt. 680.

^g Northwaite v. Bennet, 2 C. and M. 316. Brook v. Guest, 3 Bing. 481. Shaw v. Hislop, 4 D. and R. 241. Furnivall v. Coombes, 5 M. and G. 736; 6 Scott, N. R. 522.

sufficient to pay the interest, and not less than 10 per cent. of the principal, in each year. Such loan must be for future repairs, and cannot be to reimburse churchwardens for money already expended, or a debt incurred for repairs.^a To authorize a vestry to borrow money, there must be express notice of the intention to do so. Where the notice was merely to consider a plan for affording additional accommodation in the church, and the vestry resolved to adopt the plan and to borrow money to carry it out, it was held that they exceeded their powers.^b

16. Archdeacons and rural deans are in their visitations to see that the churches and churchyards are properly and decently repaired and kept. If a church be out of repair, they are to admonish the churchwardens to repair it within a specified time; and if it be not certified that the church is repaired within that time, the churchwardens are to be proceeded against by ecclesiastical censures.^c Or the Ecclesiastical Court may pronounce all the parishioners contumacious if they neglect to make a rate;^d or may proceed against so many of them as are obstinate.^e Upon which judgment a writ de contumace capiendo issues, to imprison the offender until he has reconciled himself to the Court.^f

The jurisdiction of the Ecclesiastical Court in this

^a *Rex v. Churchwardens of Duralley*, 5 A. and E. 10; 6 N. and M. 333. *Piggot v. Bearblock*, 4 E. F. Moore, 399.

^b *Blunt v. Harwood*, 1 Curt. 655.

^c *Giba. Cod. App.* s. 15, No. 19.

^d *Planke v. Newcombe*, Holt, 594.

^e *Rogers v. Davenant*, 2 Mod. 8; 1 Mod. 194.

^f 53 Geo. III, c. 127, s. 1.

Visitation of
Archdeacons,
&c.

respect is recognized by the statute *De Circumspecte Agatis* (13 Edw. I.), by which "the Temporal Courts are not to interfere, if prelates do punish for leaving the churchyards unenclosed, or for that the church is uncovered, or not conveniently decked, in which case none other penance can be enjoined but pecuniary."

**Insufficient
Rate.**

17. Where a rate is made, the Ecclesiastical Court have no jurisdiction to decide upon its sufficiency. The churchwardens cannot article against parishioners, unless they contumaciously refuse to make a rate, or make one manifestly collusive.^a The churchwardens should expend the money granted, and then apply to the parishioners again; and if they refuse, and the archdeacon find the church in decay, he may proceed against them, and the parishioners, for contumacy.

Mandamus.

18. The Court of King's Bench will not enforce the making of a church-rate by mandamus, because it is matter of ecclesiastical cognizance.^b It is the province of the Spiritual Court to determine whether a church-rate is necessary, and they have powers fully efficacious to compel parishioners to repair their church. But where St. Margaret's and St. John's, Westminster, were united parishes, under 10 Anne, c. 11, and the churchwardens of St. Margaret's would not convene a vestry of their parishioners to make a rate for the repair of St. John's, the Court granted a mandamus to them for that purpose, saying that they would put in motion

^a *Greenwood v. Greaves*, 4 Hag. 77.

^b *Rex v. St. Peter's, Thetford*, 5 D. and E. 364. *Rex v. Wilson*, 5 D. and R. 602. *Re St. John's, Cardiff*, 11 Jur. 183.

their functions to assemble, in order to inquire and agree whether it was fit that a rate should be made.^a And in M. 10 Geo. II., a mandamus was issued to the churchwardens and overseers of St. James's, Clerkenwell, and the principal inhabitants thereof, to assemble together in the parish church to make rates and collect money for repairing the church.^b And a mandamus will issue to the inhabitants of a parish to compel them to elect churchwardens. It is no return to say, that by custom the parish ought to have no churchwarden, and that the duties of churchwarden have immemorially been performed by the overseers of the poor, because the office of overseer of the poor has not existed from time immemorial; and if there were no churchwarden, there would be no person to see after the repairs of the church, which the law could never allow.^c

Where by Act of Parliament the churchwardens are empowered to borrow money upon the security of church-rates, a mandamus will issue to compel them to make a rate to pay the interest and instalments of the principal of the money so borrowed.^d And where a statute enacted that the vestry should make a rate for the repairs of the church and the payment of the minister's stipend, the Court of King's Bench issued a mandamus to the parish

^a Rex v. St. Margaret's and St. John's, Westminster, 4 M. and S. 250.

^b 2 B. and Adol. 199, n.

^c Rex v. Wix, 2 B. and Adol. 197.

^d Rex v. St. Mary's, Lambeth, 3 B. and Ad. 651. Rex v. St. Michael's, Pembroke, 5 A. and E. 603; 1 N. and P. 69.

officers to call a vestry and make a rate.^a And where by statute a select vestry were empowered to make church-rates, a mandamus issued to compel them to make a rate.^b But it appearing on the return that the churchwardens refused to state to the vestry the amount necessary to repair the church, or to furnish them with any information whereby they might ascertain how much was necessary, a peremptory mandamus was refused.^c

So where the obligation to make church-rates is founded upon custom, a mandamus will issue, as where by custom a township is bound to contribute towards the repairs of the church. The writ will not issue where the validity of the rate is doubtful, because the result might be to involve the township in a doubtful litigation;^d nor unless the custom is established with certainty. The exact proportion the township is bound to contribute must be shown.^e It must appear that the inhabitants of the township have been summoned, because if the custom requires a summons, the rate would be invalid without it; if it does not, the custom is unreasonable and void.^f

The reason a mandamus is granted in these cases is, that the Ecclesiastical Court has no power to decide on the construction of an Act of Parliament, or the validity of a custom.

^a *Rex v. Wardens of St. Saviour's, Southwark*, 1 N. and P. 496. *Regina v. Wardens of St. Saviour's, Southwark*, 7 A. and E. 925; 3 N. and P. 126.

^b *Regina v. St. Margaret's, Leicester*, 8 A. and E. 889.

^c 10 A. and E. 730.

^d *Reg. v. Thomas*, 3 Q. B. 589.

^e *Reg. v. Pickles*, 3 Q. B. 599, *n*.

^f *Reg. v. Dalby*, 3 Q. B. 602.

19. Where a church-rate is made, and a party rated refuses payment, he may be proceeded against in the Ecclesiastical Court. If he be a Quaker, and the rate be under £50, he may be summoned before two justices, and they may issue a distress warrant to levy the amount.^a And in other cases, where the rate does not amount to £10, and is not questioned in the Ecclesiastical Court, justices may proceed to enforce payment by distress; but where the validity of the rate is disputed, and notice given to the justices, they shall forbear giving judgment.^b In both these cases the judgment of the justices may be reviewed by the sessions upon appeal. The hearing is to be before two justices, but the summons may be under the hand of one, and the distress warrant may be issued by one of the justices who heard the complaint and ordered payment. Where no suit is actually commenced in the Ecclesiastical Court, the justices are bound to entertain the case;^c but where the party shows them that he bonâ fide disputes the validity of the rate, they cannot proceed to judgment; as where he contended he was not rateable, because he had no seat in the chapel. Merely saying that he disputes the validity of the rate will not oust the justices of their jurisdiction.^d The justices have no jurisdiction where the validity of the rate has at any time been questioned in the

Proceeding
where Payment
refused.

^a 7 & 8 Wm. III. c. 34, s. 4; 1 Geo. I. st. 2, c. 6, s. 2; 53 Geo. III. c. 127, s. 6.

^b S. 7.

^c Rex v. Wrottesley, 1 B. and Ad. 648.

^d Rex v. Milnrow, 5 M. and S. 248. Dale v. Pollard, 10 Q. B. 504.

Ecclesiastical Court, though the Court has decided in favour of the rate.^a But in cases where the rate is under £10, and the legality not disputed, the jurisdiction of the Ecclesiastical Court is completely taken away.^b

A suit in the Ecclesiastical Court for a rate under £10 is not improper, unless it appears that the defendant does not dispute the rate. Therefore, if the defendant be arrested for contempt of the Court before he has made his defence in such a suit, he cannot be discharged upon habeas corpus;^c nor is it necessary to give jurisdiction to the Ecclesiastical Court in such a case, that the party should have been summoned before a magistrate.^d

The justice has jurisdiction to determine whether the rate is properly made, and his decision is binding on the party rated.^e And if the rate is not disputed before the justice, its validity cannot be questioned in replevin.^f

Where the validity of the rate is doubtful, as if the heading is for the repair of the church and other purposes, the Court of Queen's Bench will not compel the justices to act.^g

One of several churchwardens,^h or a church-

^a *Rex v. Sillifant*, 4 A. and E. 354; 5 N. and M. 640.

^b *Ricketts v. Bodenham*, 4 A. and E. 433. *Richards v. Dyke*, 3 Q. B. 256.

^c *Re Baines, Craig and Phil.* 31. *Reg. v. Thorogood*, 12 A. and E. 183.

^d *White v. Beard*, 2 Curt. 480.

^e *Reg. v. Bidwell*, 2 C and K. 564.

^f *Ramsbottom v. Duckworth*, 1 Ex. 506.

^g *Reg. v. Wilkinson*, 12 Jur. 479.

^h *Reg. v. Fenton*, 1 Q. B. 480.

warden *de facto*, whose election is invalid,^a may apply to justices to enforce the payment of a church-rate.

If the party rated dies, his executor cannot be cited to the Ecclesiastical Court for non-payment of the rate.^b A suit for the subtraction of a church-rate may be removed, like any other cause, by letters of request from the commissary of the bishop to the Court of Arches.^c

By 3 & 4 Vict. c. 93, power is given to the judicial committee of the Privy Council and to the judge of the Ecclesiastical Court to discharge any party in custody under a writ *de contumace capiendo*; and it is provided that in cases of subtraction of church-rate for an amount not exceeding £5, where the party in contempt has suffered imprisonment for six months, the consent of the other parties to the suit shall not be necessary to enable the judge to discharge him, so soon as the costs lawfully incurred by reason of the custody and contempt of such party shall have been discharged, and the sum for which he may have been cited, have been paid into the registry of the Court, there to abide the result of the suit. Under this statute the payment of the costs in the Ecclesiastical Court only is required.^d

^a Reg. v. St. Clement's, 12 A. and E. 177.

^b Williams v. George, 3 Curt. 343.

^c Harris v. Pellatt, 2 Curt. 473.

^d Baker v. Thorogood, 2 Curt. 632.

CHAPTER VIII.

DILAPIDATIONS OF HIGHWAYS AND BRIDGES.

1. Obligation of Inhabitants of Parish.—2. Where Highway passes along two Parishes.—3. What is a Highway.—4. Dedication of Highway.—5. Dedication by Leaseholder.—6. Limited Dedication.—7. Obligation by Prescription or Custom.—8. Where Way widened, altered, &c.—9. Conversion of prescriptive Highways into Parish Highways.—10. Obligation by Enclosure.—11. Surveyor of Highways of Parishes.—12. District Surveyors.—13. Boards of large Parishes.—14. Rates.—15. Surveyors' Accounts.—16. State of Repair of Highways.—17. Encroachments.—18. Materials for Repairs of Highways.—19. Proceedings for Dilapidations, &c.—20. Repairs of Turnpike Roads;—21. Of Bridges.—22. How repaired.—23. Causeways to.—24. Bridges on Turnpike Roads.—25. What a public Bridge.—26. Rates for and Superintendence of.—27. Materials.

Obligation of
Inhabitants of
Parish.

1. By the general rule of the common law, the parish—that is, the occupiers of land within the parish—are bound to repair all the highways therein.^a Sometimes, by special prescription, the inhabitants of a township are bound to repair highways within the township, and sometimes one parish is bound to repair highways situate in another.^b A corporation or individual may be bound to repair highways by reason of the tenure

^a 1 Rol. Abr. 390. Austin's case, 1 Vent. 183. Rex v. Broughton, 5 Bur. 2700.

^b Rex v. Mayor of Warwick, 2 Show. 201. Rex v. Ragley, 12 Mod. 409.

of some particular lands; an individual may also be bound to repair highways by reason of enclosure. These are exceptions: the general rule is, that parishioners shall repair the highways; and where the parties bound by prescription become insolvent and unable to repair, the charge falls upon the parish.^a Where the inhabitants of a township had immemorially repaired highways within the township, and a new road was made by Act of Parliament, which expressly exempted the inhabitants of the township from the charge of repairing it, it was held, that, *ex necessitate*, the rest of the parish were liable.^b And where a turnpike road is made by an Act of Parliament, and placed under the management of trustees, who are to repair out of the tolls, the parish may be indicted if the road be out of repair, because they are liable by the general rule of the common law; and the tolls, &c., in the hands of the trustees, are only an auxiliary fund; and if such fund fail, recourse can only be had to the parish.^c But where such road is made in a township which, by prescription, is bound to repair the roads within it, the inhabitants of the township must repair, because, by the prescription, the township stands in the place of a parish as to the repair of highways.^d It is obvious that the parishioners cannot discharge themselves from their liability to repair a highway by agreement or

^a *Young v. ———*, 1 Lord Ray, 725. *Rex v. Inhabitants of Oxfordshire*, 4 B. and C. 194. Same law as to county bridge.

^b *Rex v. Inhabitants of Sheffield*, 2 D. and E. 106.

^c *Rex v. St. George's, Hanover Square*, 3 Camp. 222. *Rex v. Inhabitants of Netherthong*, 2 B. and Ald. 179.

^d *Rex v. Netherthong*.

otherwise, since such an agreement would affect the rights and security of the public, to whom the parish is bound.^a Where highways are situate within an extra-parochial hamlet, it has been doubted whether the inhabitants of such hamlet are, without a special custom, liable to repair; but it would seem, upon principle, that they are liable to repair, because otherwise the roads would not be repaired at all; and in the case of a turnpike road, there could be no persons ultimately liable to keep it in repair, in the event of the tolls, &c., proving inadequate, because to such road no prescription or custom would apply.^b

Where Highway passes along two Parishes.

2. Sometimes the boundaries of a parish pass through the middle of a highway, and half the highway is in one parish, and half in another. In such case it is provided,^c that justices, at a special sessions for the highways, on complaint of the surveyor of either parish, (stating in writing, with a plan annexed, that there is such a highway, one side whereof ought to be repaired by one parish, and the other side by another, and particularly describing the same by metes, bound, and admeasurement thereof,) may issue their summons, with a copy of such writing and plan, to the surveyor of the other parish, to appear before them on a day mentioned in such summons; and if the parties appear, such justices may proceed finally to decide the matter, if all parties consent. But if the sur-

^a 3 Vent. 90. *Rex v. Mayor of Liverpool*, 3 East, 86. *Rex v. Inhabitants of Scarsbrick*, 1 N. and P. 583; 6 A. and E. 509.

^b *Rex v. Kingsmoor*, 2 B. and C. 690.

^c 5 & 6 Wm. IV. c. 50, s. 58.

veyor summoned do not appear on the first summons, or, appearing, requires further time, the justices may adjourn the further consideration of the matter for any further time, not more than twenty-one days, nor less than fourteen days, from the date of such adjournment, of which the surveyor not appearing, or requiring further time, is to have notice. On which day the said justices are to proceed to hear the parties and their witnesses, and, whether the party summoned does or does not appear, to examine, and finally determine the matter in the following manner:—They are to divide the whole of the highway, by a transverse line, into equal parts and proportions, as in consideration of the soil, waters, floods, and inequality, or any other circumstances attending the same, they, in their discretion, think just and right; and to declare, adjudge, and order, that the whole of the highway, or both sides thereof, in any of such parts, shall be maintained and repaired by one of such parishes; and that the whole thereof, on both sides, in the other of such parts, shall be repaired and maintained by the other of such parishes; and they are to cause their order, and a plan of such highway, and the allotment, to be fairly delineated on paper or parchment, and filed with the clerk of the peace of the county; and also to cause such posts, stones, or other boundaries to be placed and set up in the highway, as in their judgment is necessary for ascertaining the division and allotment thereof. If the repair of any part of the highway belongs to any body, or person, by the reason of tenure or otherwise, the same proceedings may be adopted;

but the body, or person, or some one in their behalf, may appear before the justices, and object to the proceedings; in which case the justices, before they divide the highway, must hear, consider, and determine the objections.

After the order and plan is filed with the clerk of the peace, the parishes or persons are bound to repair that portion of the highway allotted to them, and are exonerated from repairing the other portion.^a

The costs of this proceeding are to be settled and apportioned by the justices between the two parishes or persons interested; and if they refuse or neglect to pay, the justices at special sessions may issue a warrant to levy the amount upon the goods of the surveyor of the parish, or of the body or individual refusing.^b

What is a
Highway.

3. The highways which the parishioners are bound to repair are all the highways within the parish. It becomes, therefore, of importance to ascertain what is a highway. And it may be stated, that every thoroughfare which is used by the public is a highway, whether it be a carriage-way, a horse-way, or a foot-way:^c a navigable river is a highway. In one case parishioners were indicted for not repairing stairs leading to the Thames.^d A way merely leading to a church, a village, or a private house, and therefore not useful to the public generally, is not a highway.^e An indictment, describing a way as a common foot-way, leading to a church, is good,

^a 5 & 6 Wm. IV. c. 50, s. 59.

^b S. 60.

^c *Madox's case*, Cro. El. 63. *Regina v. Saintiff*, 6 Mod. 255.

^d *Rex v. Limehouse*, 2 Show. 455.

^e *Austin's case*, 1 Vent. 189.

because the way might lead further; but if it describes the way as a common foot-way *for the parishioners* to the church, it is bad.^a It has been held that a way, if open to the public, is a highway, though it be not a thoroughfare.^b But this may be doubted, since such a way can be of no utility to the public generally, but only to those who have occasion to go to the enclosure to which it leads.^c

A highway may be created by Act of Parliament; and when it has been recognized in an Act of Parliament as public, it is a highway, and repairable as such.^d Where a highway is created by a temporary Act, it ceases to be such when the Act expires, and statute duty done upon it in obedience to the Act is no adoption of it by the public.^e When, by Act of Parliament, trustees are empowered to make a road or roads, no part of them becomes a highway until the whole are made.^f But when several roads are authorized to be made, and it is provided that they shall not become public until two justices have certified that the said roads respectively are fit to be travelled on, each road becomes public so soon as the justices have certified; and it is not a condition that they shall all be made before any are public highways.^g

^a Thrower's case, 1 Vent. 208.

^b Rex v. Lloyd, 1 Camp. 360. Rugby Charity v. Merryweather, 11 East, 375, n. Rex v. Downshire, 4 Ad. and El. 698.

^c Woodyer v. Hadden, 5 Taunt. 125. Wood v. Veal, 5 B. and Ald. 454.

^d Rex v. Lyon, 5 D. and R. 497.

^e Rex v. Mellor, 1 B. and Ad. 32.

^f Rex v. Cumberworth, 3 B. and Ad. 108; 4 Ad. and El. 731.

Rex v. Edge Lane, 4 Ad. and El. 723.

^g Rex v. Yorkshire, 5 B. and Ad. 1003.

Dedication of
Highway.

4. Formerly, wherever a party made a way over his land, and dedicated it to the public, and the public used the way, it became a public highway, and repairable by the parish.^a Now, by the Highway Act,^b (which came into operation on the 30th of March, 1836,) “ No road or occupation-way made, or hereafter to be made, by and at the expense of any individual or private person, body politic or corporate, nor any roads already set out, or to be hereafter set out, as a private driftway or horse-path, in any award of Commissioners under an Enclosure Act, shall be deemed or taken to be a highway, which the inhabitants of any parish shall be liable to repair, unless the person proposing to dedicate such highway to the use of the public shall give three calendar months’ previous notice, in writing, to the surveyor of the parish, of his intention to dedicate such highway to the use of the public, describing its situation and extent, and shall have made, and shall make, the same in a substantial manner, and of the width required by the Act, and to the satisfaction of the surveyor and two justices of the peace, of the division in which such highway is situate, in petty sessions assembled.”

By this method of voluntary dedication have all the more ancient and many modern public rights of way originated. It will, therefore, be useful to consider what at common law is a dedication of a way to the public. The acts amounting to a dedication of a way to the public are not very clearly defined. The only rule that can be given is, that any acts of

^a *Rex v. Leake*, 2 N. and M. 583.

^b 5 & 6 Wm. IV. c. 50, s. 23.

the proprietor of the land which show his intention of permitting the public to use his land as a way, confer on the public a right; and if the public accept of that right, and make use of the way, it becomes to all intents a highway, and repairable by the parish. Thus if a person open a street, and build houses on each side, the street is at once a public way.^a And so if a person having made a way for his private convenience permit it to be used without interruption by the public as a thoroughfare for any considerable time, it becomes a public way.^b Whether the user by the public has been sufficiently notorious, and for a sufficiently long time, is a question for the jury. Where there has been such user, the way is a public highway, and it is not material to inquire who the owner was, or whether he intended to dedicate.^c The question is, whether from the acts of the owner an idea has grown up in the mind of the public that the way is public.^d But if one build a street upon his land, which is not a thoroughfare, there can be no dedication to the public, because nothing can be presumed from that act but a licence to those who have occasion to go to and from the houses to pass along the street.^e And so if he show an intention of not permitting the public generally to pass down the street, as is done by the Duke of Bedford in South-

^a *Sir John Lade v. Shepherd*, 2 Str. 1004. *Woodyer v. Hadden*, 5 Taunt. 137, per Chambre, J.

^b *Rex v. Lloyd*, 1 Camp. 260.

^c *Reg. v. Eastmark*, 17 Law Journ. Q. B. 177; 12 Jur. 332.

^d *Grand Surrey Canal Company v. Hull*, 1 M. and G. 392.

^e *Woodyer v. Hadden*, 5 Taunt. 125.

ampton Street, Covent Garden, by placing a bar across the street. And where a bar had been placed across the carriage-way of a street, but soon after knocked down, it was held that there was no dedication to the public, even of a foot-way.^a And where in an action of trespass the defendant justified under a public foot-way, it appeared that the plaintiff had recently erected a gate where a gate had formerly stood, which, however, had been down for twelve years, the plaintiff had a verdict, the jury negating the dedication of the way.^b Where the dedication is proved to have been only for a limited time, the presumption of a general dedication to the public is rebutted; as where it appeared that the right of way had been leased for a term of fifty-six years, permitting the public to use the way for four years after the expiration of the term was held not to extend their right.^c Where a way had been set out by Commissioners under an Enclosure Act as an occupation-road, the use of such road by the public generally did not raise the presumption that it had been dedicated to the public by the landowner, because it was compulsory on him to keep the way open for the farmers to whom it had been assigned.^d

Dedication by
Leaseholder.

5. Again, where the dedication has been made by a leaseholder or tenant for life, it will not bind those

^a *Roberts v. Kerr*, 1 Camp. 262, *n.* *Poole v. Huskinson*, 11 M. and W. 827. *Rex v. Leake*, 5 B. and Ad. 469. *Barraclough v. Johnson*, 8 Ad. and El. 99.

^b *Lethbridge v. Winter*, 1 Camp. 263, *n.*

^c *Rex v. Hudson*, 2 Str. 909.

^d *Rex v. St. Benedict, Cambridge*, 4 B. and Ald. 477. *Rex v. Enfield*, Burn's Justice, vol. ii. p. 821, 4th edit.

claiming in remainder or reversion. Thus in *Wood v. Veal*,^a it appeared that the place called Little Abingdon Street, Westminster, had been paved and lighted by Commissioners under a private Act of Parliament, and used by the public as far back as living memory. On the part of the plaintiff it was proved that the premises had been leased in 1719 for ninety-nine years, which term expired in 1818, and in 1820 the defendant erected a fence across the street, which occasioned the action. Abbot, C.J., left it to the jury to presume a dedication previous to 1719, and his ruling was confirmed by the Court. If the land over which the right of way is claimed has been let to a succession of tenants during the period the way has been exercised, the acquiescence of the landlord will be presumed, since at the expiration of each lease he had an opportunity of disputing the right.^b

6. A way may be dedicated for a limited time; it may also be dedicated for particular periods, as where it appeared that a bridge was used by the public at all times, on foot and with horses, but only occasionally with carriages, in times of flood and frost, when it was unsafe to pass through the river. In ordinary times the carriages went through the ford, and the bridge was sometimes barred against carriages by a chain, locked to posts. Lord Ellenborough held that this was a public right of way, limited as to time.^c It has been doubted, however,

Limited Dedication.

^a 5 B. and Ald. 454.

^b *Rex v. Barr*, 4 Camp. 16. *Duncombe v. Smith*, Wellbeloved on Highways, 61.

^c *Rex v. Northampton*, 2 M. and S. 262.

whether there can be a partial dedication of a way, that is, of a right of way for some carriages and not for others. The argument against such a dedication is, that it is unjust for the public generally to be obliged to repair a road which a portion of the public only are allowed to use.^a

There cannot be a dedication to a particular part of the public, as to the inhabitants of a parish; such a dedication is simply void.^b

Obligation by
Prescription or
Custom.

7. By prescription an individual or corporation may be bound to repair a highway. By custom a township may be bound to repair all highways within it, or a parish or township may be bound to repair highways lying within another parish. Prescriptions and customs are not good if unreasonable, and therefore an individual cannot be charged with the repair of a highway, unless there is some particular reason for charging him, as by reason of the tenure of certain lands, or of the perception of certain tolls; for the law cannot presume a reason why an individual should be bound to the repair of a highway to the exemption of the parishioners. But a corporation which may have had an immemorial existence, may be bound to repair without express consideration, because such a body may have agreed, for a consideration which is forgotten, to repair the highway for ever.^c In an indictment against an individual, therefore, it must be stated that he holds some land, or receives some tolls, by virtue of which

^a *Roberts v. Kerr*, 1 Camp. 262, n. *Rex v. Northampton*, 2 M. and S. 262. *Marquis of Stafford v. Coney*, 7 B. and C. 257.

^b *Poole v. Huskinson*, 11 M. and W. 827.

^c 1 Rep. 33. 3 Hawk. P. C. c. 76, s. 8.

he is liable to repair the way in question. In an indictment against a corporation, it only need be stated that it ought and hath used to do it.*

Where a township is bound to repair all highways lying within it, no reason need be alleged, because such a custom accords with the principle of the common law, that every highway shall be repaired by the inhabitants of the territory in which it is situate, and varies from the common law only as to the extent of the territory liable.^b And so a parish may, by immemorial usage, without other reason, be bound to repair a bridge situate within it.^c But where it is sought to charge a parish or township with the repair of highways situate out of its bounds, a special reason as well as immemorial usage must be shown.^d The tenure of lands is not sufficient, because the inhabitants of a parish, &c., being a fluctuating body, cannot hold lands.^e

It is hardly necessary to observe that the highways which an individual or corporation is bound to repair by prescription, must have existed from time immemorial; and so where there is a custom for one parish to repair highways situate within another, such custom can only extend to immemorial highways. But a custom for a township to repair its own highways is general, and will extend

* 1 Rep. 33. 3 Hawk. P. C. c. 76, s. 8.

^b *Rex v. Inhabitants of Ecclesfield*, 1 B. and Ald. 348. *Rex v. Inhabitants of West Riding, Yorkshire*, 4 B. and Ald. 623.

^c *Rex v. Hendon*, 4 B. and Ad. 628.

^d *Rex v. Inhabitants of St. Giles's, Cambridge*, 5 M. and S. 260. *Rex v. Inhabitants of Bishop's Auckland*, 1 Ad. and El. 744.

^e *Rex v. Inhabitants of Machynlleth*, 2 B. and C. 166.

to all highways within the township, whether of ancient or modern origin.^a

Where lands chargeable with the repair of a highway are conveyed to several, they are all liable to do the repairs in proportion to the quantity of land they hold; though if the way be dilapidated, any one of the proprietors may be indicted separately, and compelled to pay the whole fine. He may proceed against those who are jointly liable with him for contribution.^b If lands so chargeable come into the hands of the Crown, they are not discharged.^c

It is the occupier and not the freeholder of the lands chargeable with repairs of a highway against whom the indictment should be preferred.^d Where the tenant of the lands is an infant, the indictment should be against his guardian.^e The occupier is entitled to be reimbursed by his landlord the sum expended in repairs.^f

Where Way
widened, al-
tered, &c.

8. Where a bridge which a party is bound to repair by prescription is widened or enlarged, he is only bound to do those repairs which would be required if the bridge, &c., were in its original state. All those repairs rendered necessary by the additions the county is liable for, and this although the party himself widen the bridge.^g

Where a highway is widened, turned, or diverted,

^a Rex v. Inhabitants of Hatfield, 4 B. and Ald. 75.

^b 3 Hawk. P. C. c. 77, s. 3. Dimes v. Arden, 6 N. and M. 494.

^c Reg. v. Duchess of Buccleuch, 1 Salk. 358. Rex v. Buck-
eridge, 4 Mod. 48.

^d Reg. v. Watts, 1 Salk. 357. Reg. v. Bucknall, 2 Lord Ray, 804.

^e Rex v. Sutton, 3 A. and E. 597.

^f Baker v. Greenhill, 3 Q. B. 148.

^g Rex v. West Riding of Yorkshire, 2 East, 353, n.

it is, by order of two justices at special sessions, to be placed under the control of the surveyor of highways of the parish, and to be repaired by the parish. Such a highway is to be viewed by two justices, who are to make a report to the justices at special sessions. And the justices at sessions, by order under their hands, are to fix the sum to be annually paid, or a sum certain to be paid, by the party bound by prescription.*

9. A provision is also made for converting highways, prescriptively repairable by individuals or corporations, into parish highways. Either the party liable to repair, or the surveyor of the highways, having obtained the consent of the inhabitants in vestry, may apply to any justice for the purpose of making the highway a parish highway, to be repaired by the surveyor of the parish. And the justice is authorized and required to issue his summons, requiring the surveyor, or the party liable to repair, to appear before the justices at the next special sessions for the highways; and if both parties appear, the justices may proceed to determine the matter. But in case the surveyor, or party summoned, do not appear on the first summons, or, appearing, require further time, the justices may adjourn the matter to the next special sessions for the highways, of which the surveyor, or party not appearing, must have notice; on which day the justices assembled at special sessions may proceed to hear the parties and their witnesses, and, whether the surveyor or parties summoned do or do not appear,

Conversion of
prescriptive
Highways into
Parish High-
ways.

* 5 & 6 Wm. IV. c. 50, s. 93. See Reg. v. Barton, 11 A. and E. 343.

may proceed to examine and determine the matter; and in case they decide that the highway shall become a parish highway, and be repaired by the surveyor of the parish, they shall, by an order under their hands, fix the proportion of the expenses of repairing the said highway, to be annually paid by the party prescriptively bound to the surveyor.

The justices, instead of fixing the proportion of the expenses of repairing the highway, to be annually paid, may fix a certain sum to be paid by the individual to the surveyor in full discharge of all claims in respect of the repairs of the highway. In default of payment, the surveyor may proceed in the same manner as to recover a penalty under the statute. When the sum fixed to be paid in full discharge exceeds £100, the money, when received, shall be vested in the name of the churchwardens, ministers, and surveyors of the highways of the parish, in some public Government securities, and the interest and dividends shall be applied to the repairs of the highways within the said parish. When the sum fixed to be paid in full discharge does not exceed £100, it or a part may, by and with the consent of the inhabitants of the parish in vestry assembled, be paid to the surveyor, to be applied towards the repairs of the highways within the parish.*

Obligation by
Enclosure.

10. The last case to be considered is that of those bound to repair by reason of enclosure. Where a party encloses his land on the side of a highway, it is deemed an encroachment on the rights of the public; because, whenever the way is out of repair and impassable, they have a right to go over the

* 5 & 6 Wm. IV. c. 50, s. 62.

adjoining land so far as to avoid the bad way. Therefore the law is, that where a party encloses his land so as to prevent or impede the public in the exercise of this right, he shall keep the way in repair.^a And in such case the encloser is absolutely bound to keep up a perfect good way; and if it be out of repair, the passengers may make gaps in his hedges, and go over his land, so as to avoid the bad way.^b

Where there is an ancient enclosure on one side of the way, and the landholder on the other side encloses his land, he must repair the whole way; but if there be no enclosure on the opposite side, he is only bound to repair half the way; and if the other landholder enclose, he must repair the other half.^c If he subsequently destroy his enclosures, he will be freed from the repairs of the way, and the burden will revert to the parish.^d Where an enclosed highway was diverted by writ ad quod damnum, or under the old Highway Acts, the owner of the enclosed lands was not bound to repair the new road, unless expressly made liable by the jury under the writ ad quod damnum.^e By 5 and 6 Wm. IV. c. 50, s. 92, in such case the party liable to repair the old highway is to continue liable to repair the new; so that if a highway should be diverted whilst a party is liable to repair by enclo-

^a Sir Edward Duncombe's case, Cro. Car. 356.

^b Henn's case, Sir W. Jones, 296.

^c Rex v. Sir N. Staughton, 1 Sid. 454. 2 Saund. 160.

^d 2 Saund. 160.

^e Exp. Vennor, 3 Atk. 772. Rex v. Inhabitants of Flecknow, 1 Bur. 461.

sure, his defeasible liability will be rendered absolute and permanent.

Surveyor of
Highways of
Parishes.

11. The repairs of highways are regulated by the statute 5 and 6 Wm. IV. c. 50. This statute does not extend to turnpike roads, to highways repaired under local or personal Acts of Parliament,^a to the universities of Oxford or Cambridge,^b nor to the city of London and the liberties thereof.^c

By this statute highways are placed under the care of a surveyor or surveyors, elected annually by the inhabitants at their first meeting in vestry for the nomination of overseers. An out-going surveyor is to continue to act until his successor is appointed, and may be re-elected. In parishes where there is no meeting for the nomination of overseers, the inhabitants contributing to the highway-rate are to meet at the usual place of public meeting on the 25th of March, or within fourteen days afterwards, to elect one or more persons to serve the office of surveyor.^d

The qualification of the surveyor is an estate in lands within the parish of the annual value of £10, either in right of himself or his wife; or a personal estate of the value of £100; or a tenancy of premises within the parish of the annual value of £20. Where the qualification is by estate, the party must be resident within the parish, or an adjoining parish; and if not a resident parishioner, he is only eligible if willing to serve. Where the qualification is occupation of lands, residence is immaterial. Persons exempted from serving the office of overseer are not

^a 5 & 6 Wm. IV. c. 50, s. 113.

^b S. 114.

^c S. 115.

^d S. 6.

compellable to serve the office of surveyor. The surveyor may appoint a deputy, to be approved by the justices at their special sessions for highways.^a A surveyor not acting or appointing a sufficient deputy is liable to a penalty not exceeding £20.^b If the majority of the inhabitants in vestry assembled think fit, a surveyor may be appointed with a salary.^c If the parishioners neglect or refuse to appoint a surveyor, or if the out-going surveyor does not deliver to the justices a statement of the name and residence of his successor, or if the surveyor die or become disqualified, or neglect his duties, the justices, at their special sessions for highways, may appoint a surveyor.^d Where the parish is in two counties, the justices of the county in which the church is situate are to act.^e

12. The inhabitants of any parish in vestry assembled may empower one of their churchwardens, or the chairman of the vestry, to apply to the justices of the county, or of the division in which all the parishes proposed to be united are situate, for the purpose of being united with one or more parishes, to form a district for the management of highways, and to appoint a person named by such parish as a district surveyor, at a salary agreed upon by the parish; which application, with the name of the proposed surveyor, signed by the churchwardens or chairman, is to be forwarded to the clerk of the justices or the clerk of the peace.^f

The justices, upon consideration of the application,

^a 5 & 6 Wm. IV. c. 50, s. 7.

^b S. 8.

^c S. 9.

^d S. 11. Reg. v. Best, 5 D. and L. 40. 2 B. C. 90.

^e 5 & 6 Wm. IV. c. 50, s. 12.

^f S. 13.

may unite so many of the parishes applying as they think fit into a district, and select one of the persons nominated by the several parishes to act as district surveyor.^a

The names of the parishes united, and of the surveyor appointed, signed by the chairman of the quarter sessions, or the majority of the justices of the special sessions, is to be forwarded to the clerk of the peace, who is to lay the same before the quarter sessions, and the sessions are to cause the same to be enrolled among their records: a copy is then to be forwarded by the clerk of the peace to each of the churchwardens, or the surveyor of each of the parishes united.^b

The district will continue for three years absolutely, and after that until one of the parishes give to each of the others twelve months' notice of its intention to separate. The notice must be resolved upon by the vestry, and signed by one of the churchwardens, or the chairman of the vestry of the dissentient parish. By the direction of the vestry, it must be served on the churchwardens and surveyor of each of the other united parishes, or the district surveyor appointed by the justices, and the clerk of the peace.^c

The district surveyor has the same power as the parish surveyor, except as to levying rates. He can only expend money raised by one of the parishes for the repair of the highways in such parish; but with the consent of inhabitants of one parish, he may expend their money for the common benefit of the union. His salary, as agreed upon, is to be paid by

^a 5 & 6 Wm. IV. c. 50, s. 14.

^b S. 15.

^c Ibid.

the surveyor of each parish out of the rates.^a In united parishes, a surveyor is to be appointed for each parish, whose only duty it is to make and levy rates, and pay over the money to the district surveyor.^b

13. In parishes where the population at the then last census exceeds 5000, two-thirds of the votes of the vestry may agree to form a board for the management of the highways, and may elect (not exceeding twenty nor less than five) householders assessed to the poor-rate to serve the office of surveyor of the highways for the year ensuing. And such board, or any three of them, may act as surveyors, may appoint collectors, an assistant surveyor and clerk, determine the salaries of the assistant surveyor and clerk, and may exercise all the powers vested in the surveyor of highways or vestry. They may also appoint a treasurer for the deposit of monies. At the expiration of their year of office they must present to the vestry copies of their accounts and the minutes of their proceedings.^c

Boards of
large Parishes.

They may also rent or (with the consent of the vestry) purchase premises for keeping the implements and materials for the reparation of highways, or for preparing materials for the same. They may determine whether any of the highways shall be curbed or paved with stone.^d

14. The common law imposed the obligation to repair highways upon the inhabitants of the parish, but did not specify the mode in which the repairs were to be done, nor did it make any provision for

Rates.

^a 5 & 6 Wm. IV. c. 50, s. 16.

^b S. 17.

^c S. 18.

^d S. 19.

proportioning the charge among the different individuals liable. Various statutes,^a however, were enacted, fixing the quantity of labour to be performed by each occupier of lands, tenements, woods, tithes, and hereditaments, upon the highways, according to the number of teams and horses he kept. This was called statute duty.

All these statutes have been repealed by the recent Highway Act; and now, in order to raise money for the repair of highways, the surveyor is directed to make a rate upon all property rateable to the relief of the poor, and also on woods, mines, quarries, and other hereditaments heretofore usually rated to the highways.^b The rate is to be signed by the surveyor, and allowed by two justices of the peace, and published in the same manner as poor-rates are allowed and published.^c

The surveyor may inspect, or grant authority to inspect, the poor-rate books, and make extracts therefrom; and if obstructed by the person in whose custody the books are, such person is subject to a penalty not exceeding £5.^d

Every rate must contain the names of the occupiers, the description of the premises or property they occupy, and the full annual value of such premises or property, and also specify the sum in the pound in which it is made: no single rate can exceed tenpence in the pound, nor can rates exceeding

^a Consolidated by 13 Geo. III. c. 78; 34 Geo. III. c. 74; 44 Geo. III. c. 52; and 54 Geo. III. c. 109.

^b Reg. v. Rose, 6 Q. B. 153. 1 D. and M. 300.

^c 5 & 6 Wm. IV. c. 50, s. 27. Reg. v. Best, 5 D. and L. 40. 2 B. C. 90.

^d 5 & 6 Wm. IV. c. 50, s. 28.

two shillings and sixpence in the pound be made in one year. But with the consent of four-fifths of the inhabitants contributing to the highway-rate, assembled at a meeting specially called for that purpose, ten days' previous notice of the same having been given by the parish surveyor, the rate may be increased to such sum as the said inhabitants so assembled think *proper*.^a

In parishes in which the overseers of the poor have power, by local Acts of Parliament, to compound with landlords for poor-rates, and, in case of their refusal to compound, to rate such landlords as the occupiers, the surveyor has the same powers to compound and enforce composition for the highway-rates.^b

Whenever it appears to the surveyor that there has been any omission or error in any rate or assessment, or in the name of any person or property rateable, he may, with the consent and approbation of the justices, at a special sessions for the highways, cause to be added or corrected in the said rate the name of any person omitted or erroneously stated, or the description of the property rateable.^c

Upon application of any person rated to be discharged therefrom, and upon proof of his inability, through poverty, to pay such rate, the surveyor having been first summoned to appear, the justices, at their special sessions of highways, may order that such person shall be excused from the payment of the rate; which order is final.^d Where property,

Composition
for Rates.

Errors in
Rates.

Discharge
from Rates of
poor Person.

Of Property
exempted.

^a 5 & 6 Wm. IV. c. 50, s. 29.

^b S. 30.

^c S. 31.

^d S. 32.

previous to the passing of this Act, was legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof, or of highway-rate, the said property is exempt from highway-rates.^a

Levying Rate.

The surveyor has the same power for levying the highway-rate as the overseers have for the recovery of the poor-rate.^b

Carriage of
Materials.

Two rate payers, within six days next after the annual appointment of the surveyor, may, by notice in writing, require the surveyor to call a meeting of the rate payers for the purpose hereafter mentioned; and the surveyor shall call such meeting within eight days after the notice, and give six days' previous intimation of such meeting; and if at such meeting a majority of the rate payers shall consent, the rate payers keeping a team or teams of two or more horses, or beasts of draught, may divide among themselves, in proportion to the amount of rate to which they may be assessed, the carrying of the material required for the repair of the highways; and they shall be paid for the carriage by the surveyor within one calendar month after performance, at such rate per cubic yard material per mile as shall be fixed by the justices at their first meeting in special sessions for the highways after the 25th day of March. The work shall be performed at such times and places, and in such manner, as the surveyor shall direct (the periods of spring, seed-time, and harvest excepted). If the surveyor do not approve of the manner in which the work is performed, the justices, at a special

^a 5 & 6 Wm. IV. c. 50, s. 33.

^b S. 34.

sessions, may award such pecuniary redress or forfeiture as they think reasonable.^a

The surveyor, with the consent of the vestry, Collectors. may appoint collectors of the rates, and may remove, re-appoint, and make them such allowance as the vestry think reasonable: the collector has the same powers for levying rates as the surveyor has.^b

The surveyor is to take security from each col- Security from. lector;^c and the collector is bound, under penalties, to account to the surveyor.^d

15. The surveyor must keep separate accounts Surveyors' Accounts. of the monies levied for the highway-rate, which must specify the different sums, and the times when and the persons to and by whom the same shall have been collected and *paid*.^e

The surveyor, district surveyor, or assistant surveyor, must enter in a book a particular account of all monies which come to his hands, and to whom, on what occasion, for what work, for what place, and on what day he has applied the same; and also an account of the tools, materials, implements, and other things provided by him for the repair of the said highways. Such book, at all reasonable times, is to be open to the inspection of every rated inhabitant of the parish or district, without fee, who may take extracts from the said book: if the surveyor, district surveyor, or assistant surveyor, neglect to provide such book, or to enter therein every sum received or paid by him within one week after the same has been received or paid, or refuse to permit

^a 5 & 6 Wm. IV. c. 50, s. 35.

^b S. 36.

^c S. 37.

^d S. 38.

^e S. 39.

the inspection of the book, or extracts to be taken therefrom, he is subject to a penalty not exceeding £ 5.^a

Property in
Books, &c.

The property in all books, papers, writings, and accounts, and in all materials, tools, and implements, provided for repairing the highways, and in the scrapings of the highways, is vested in the surveyor, or district surveyor, for the time being.^b

The surveyor, district surveyor, or assistant surveyor, within fourteen days after leaving his office, must deliver all books and accounts, properly verified, together with all monies due from him, and all tools, materials, implements, and other things, to his successor in office, under a penalty not exceeding £5 for the non-delivery of the books, tools, &c., and of double the money due for non-payment of the money.^c

If the surveyor, &c., die before paying over money, &c., his executors are bound to pay over the monies, and deliver books, &c.; and in the event of their non-compliance, the remedy of the successor is by action.^d

Fourteen days after the election or appointment of the new surveyor, the accounts of the predecessor are to be made up, balanced, and laid before the vestry, who may, if they think fit, order an abstract to be printed and published; and within one month after such election or appointment, the accounts shall be signed by the surveyor, district surveyor, or assistant surveyor, for the year preceding, and laid before the justices of the peace at a special

^a 5 & 6 Wm. IV. c. 50, s. 40.

^b S. 41.

^c S. 42.

^d S. 43.

sessions for the highways, holden at the place nearest to the parish or district of the surveyor; and the justices are required to examine him as to the truth of the accounts, or of any charge contained therein. Any rate payer having complaint against the account, may complain to such justices at the time of the verification of such accounts as aforesaid; and the justices may examine the surveyor upon oath, and make such order as they deem fit.^a

The justices of the peace within their respective divisions, or any two of them, are to hold not less than eight, nor more than twelve, special sessions in every year, for executing the purposes of the statute, the days to be holden thereof to be appointed at a special sessions to be held within fourteen days after the 20th of March in every year. At the special sessions held next after the 25th day of March, the surveyor of each of the parishes within their respective divisions shall verify his accounts, and make a return, in writing, of the state of all the roads, common highways, bridges, causeways, hedges, ditches, and water-courses appertaining thereto, and of all nuisances and encroachments made upon the several highways within the parish for which he was surveyor, as well as of the extent of the different highways which the parish is liable to repair, what part thereof has been repaired, and with what materials, at what expense, and what was the amount levied during the time he was surveyor of the said *parish*.^b

Special Sessions of Highways.

^a 5 & 6 Wm. IV. c. 50, s. 44.

^b S. 45.

State of Repair of Highways.

16. A highway must be kept in such a state of repair as the exigencies of the public require, and as the nature and situation of the highway will admit of. In *Regina v. Cluworth*,^a the Court said that the defendants (the inhabitants of a parish) were not bound to put the road in a better condition than it had been time out of mind, but as it had been usually at the best. According to the reports in *Modern* and *Holt*, the observation was confined to the case of one bound by prescription to repair. In *Regina v. Stretford*,^b an indictment, merely alleging that the road was so muddy and narrow that the Queen's subjects could not pass without danger of their lives, was held bad for not alleging that it was out of repair. And in *Rex v. Devon*,^c where the indictment alleged that a bridge was so narrow that the King's subjects could not pass without danger, Bayley, J., observed, that if the public choose to take to the bridge in that state, they could not impose on the inhabitants of the county the obligation of altering it. Where a road went across an inlet of a river, and was impassable at high water, Patteson, J., directed the jury, that if they thought that the want of repair arose from the nature of the spot over which the highway went, and was occasioned by the river flowing over it at every tide, washing away the materials placed there to form a road, and leaving in their place a deposit of mud, it would be absurd to require the parish to do repairs which from their

^a Salk. 359. 6 Mod. 163. Holt, 339.

^b 2 Lord Ray, 1169.

^c 4 B. and C. 670.

nature must always be ineffectual.* But in *Rex v. Henley*,^b Patteson, J., ruled at *Nisi Prius*, that it was not enough that the road was as good as ever it was, or as it usually had been, but if the necessities of the public required it, the parish were bound to convert it from a green road to a hard road, which ruling was confirmed by the Court.

Where the highway is ruinous or narrow, the surveyor may make a road through the adjoining grounds (not being the site of any house, or a garden, lawn, yard, paddock, plantation, planted walk, or avenue to any house or enclosed ground set apart as building ground, or a nursery for trees) whilst the old road is being repaired or widened. He must make such recompense to the proprietor as the justices at special sessions think reasonable.^c

The surveyor is to make every cart-way leading to any market-town twenty feet wide at the least, every horse-way eight feet wide, and every foot-way at the side of any cart-way, &c., three feet wide, if the space between the fences will admit thereof.^d

Gateways across any carriage-way must be ten feet wide, and across any horse-way five feet wide, clear between the posts; and if the owner of any narrower gate omit to enlarge or remove it after twenty-one days' notice from the surveyor, he is liable to a penalty not exceeding 10s. per day for so long time as he so neglects.^e

The surveyor is bound to remove any accumu-

Removal of
Snow.

* *Rex v. Landulph*, 1 Moody and Rob. 393.

^b 10 Law Times, 110 Q. B. M. 1847.

^c 5 & 6 Wm. IV. c. 50, s. 25.

^d S. 80.

^e S. 81.

Cleansing
Ditches, &c.

lation of snow within twenty-four hours after notice from a justice of the peace.^a He is empowered to make, scour, cleanse, and keep open all ditches, gutters, drains, or water-courses, and to make and lay such trunks, tunnels, plats, and bridges, as he may deem necessary, in and through any lands adjoining the highway, making the owner or occupier compensation if the lands are not waste or common; the amount to be settled in the same manner as the amount of damages for getting materials from enclosed lands.^b

If any person alter or obstruct the ditches, &c., after they have been taken under the charge of the surveyor, he is bound to reimburse the surveyor the expense of reinstating them, and to forfeit a sum not exceeding three times such expense.^c

Direction-
Posts, &c.

The surveyors of parishes more than three miles from the post office are also required, with the consent of the vestry, or by the direction of the justices at special sessions, to set up direction-posts or stones in places where two ways meet, and boundary stones; and on such parts of highways as are subject to floods, to erect graduated stones to guide travellers the safest track through the floods, and to secure horse causeways and foot causeways from being passed over by waggons, by banks of earth, posts, and stones.^d

Encroach-
ments.

17. No tree, bush, or shrub can be planted on any carriage-way within fifteen feet of the centre. And if the owner do not remove it within twenty-

^a 5 & 6 Wm. IV. c. 50, s. 26.

^b S. 67. *Peters v. Clarkson*, 7 M. and G. 548.

^c S. 68.

^d S. 24.

one days after notice from surveyor, he forfeits 10*s.* for every neglect.^a

The highway is that portion of ground which has been maintained and repaired by the surveyor for six months next preceding, and the fifteen feet are to be measured from the centre of that.^b Centre of Highway.

If the surveyor think that a highway is prejudiced by any hedges or trees (except trees planted for the ornament or shelter of any hop-ground, house, building, or court-yard), he may summon the owner of the land before a justice, who may determine whether the trees, &c., shall be cut, pruned, or plashed. If the owner fail to obey the order of the justice, the surveyor may cut the hedge, and the owner must reimburse him the expense incurred.^c

No person can be ordered to cut any hedges between the last day of September and the last day of March, nor to fell any timber tree, unless the highway is ordered to be widened, and then he can only be compelled to grub up oak-trees in April, May, and June, and ash, elm, or other trees in December, January, February, and March.^d Cutting Hedges.

If any person encroach on a carriage-way within fifteen feet of the centre by any building, hedge, ditch, or fence, he forfeits a sum not exceeding 40*s.*, and the surveyor may order the building, ditch, &c., to be taken down or filled up at the expense of the owner thereof.^e

18. The surveyor may, with the consent of the vestry, contract for the purchasing, getting, or car- Materials for Repairs of Highways.

^a 5 & 6 Wm. IV. c. 50, s. 64.

^b S. 63.

^c S. 65. *Jenney v. Brook*, 2 Q. B. 265; 6 Q. B. 323.

^d S. 66.

^e S. 69. *Evans v. Oakley*, 1 C. and K. 125.

rying the materials required for the repair of highways. He is not to have any interest in such contract without the licence of two justices at special sessions, under a penalty not exceeding £10, and incapacity of being employed as a surveyor with a salary.^a

Any person taking materials obtained by surveyor, or digging from any quarry opened by the surveyor, except the owner of the quarry, or person licensed by the owner, taking for his own private use, is subject to a penalty not exceeding £10.^b

Where lands belonging to parishes, or to the surveyor of highways for the purpose of obtaining materials, become exhausted, the surveyor may, with the consent of justices at special sessions, sell the land to the owner of adjoining land, or, if he refuse, to any other person, for such price as the justices think reasonable, and apply the money, with like consent, in the purchase of other lands.^c

The surveyor may search for, dig, and carry away gravel, sand, stone, or other materials, in any waste, common, river, or brook, within the parish; or, if sufficient cannot be obtained in his parish, he may take them from any other parish, leaving sufficient for the repairs of the highways in such parish. He cannot divert or interrupt the course of any river or brook, or prejudice any building, highway, or ford, or dig materials out of any river within one hundred and fifty feet from any bridge, dam, or wear. He may gather stones lying upon any land with the consent of the owner, or licence of two justices at

^a 5 & 6 Wm. IV. c. 50, s. 46.

^b S. 47.

^c S. 48. 8 & 9 Vict. c. 71.

special sessions. After they have summoned the owner and heard his reasons, he must make satisfaction for the damage done to the lands in carrying away the stones, but not for the stones themselves.^a

But the surveyor has no power to take sea beach, Sea Beach. where its removal would increase the danger of the encroachment of the sea.^b

Materials cannot be taken from any enclosed Enclosed Ground. ground or land in the exclusive occupation of one or more persons for agricultural purposes, without having given to the owner and occupier one calendar month's notice, in writing, to appear at the special sessions. Whether they appear or not, the justices may order the surveyor to take the materials, service of the notice being proved upon oath in case of non-appearance.^c

Where sufficient materials cannot be had in the waste, commons, rivers, and brooks, the surveyor may, with the licence of two justices at special sessions, dig and carry away materials from the enclosed land of any person within the parish (such land not being a garden, yard, avenue to a house, lawn, park, paddock, or enclosed plantation, or enclosed wood not exceeding one hundred acres), or within any parish adjoining the highway, if sufficient materials cannot be had within the parish or in the wastes, &c., of the adjacent parish, and so that sufficient materials be left for the repairs of the highway in the parish where the lands lie. These questions to be determined by the justices. The surveyor is to make satisfaction for the materials taken, and also

^a 5 & 6 Wm. IV. c. 50, s. 51.

^b S. 52.

^c S. 53. 4 & 5 Vict. c. 51.

for the damage done to the lands in taking and carrying away the same.*

When the surveyor digs pits for the purpose of obtaining materials, he must cause the same to be fenced; and when the pit is no longer useful, it must be filled up or sloped down and fenced within fourteen days, under a penalty of 10s. for every default; and if the surveyor neglect to do so for six days after notice, he forfeits not exceeding £10, to be applied in fencing, &c., the pit.^b

If the surveyor, without taking all reasonable precaution, leave a heap of stone, &c., on the highway during the night, to the danger or personal damage of any passenger, he forfeits a sum not exceeding £5.^c

If, in digging for materials, he damage any bridge, mill, building, dam, highway, occupation-road, ford, mines, or tin or other works, he is not only liable to a civil action, but also to a penalty not exceeding £5.^d

There are also several enactments empowering justices to widen, stop up, and divert highways; but as these provisions, and the decisions thereon, would carry me into too wide a field, and are not altogether german to the subject in hand, I must content myself with referring to the sections of the statute.^e

Proceedings for
Dilapidations,
&c.

19. If a highway be out of repair, any justice may, upon the information on oath of one witness,

* 5 & 6 Wm. IV. c. 50, s. 54. ^b S. 55. ^c S. 56.

^d S. 57.

^e S. 82 to 93. See *Wilkinson v. Bagshaw*, Peake, Add. Cases, 165.

summon the surveyor, or party liable to repair, at some special sessions; and the justices there may appoint some competent person to view the highway, and report thereon to the special sessions, or the justices may fix a day for themselves, or any two of them, to view the highway. And if it shall appear to the special sessions that the highway is not in a state of thorough and effectual repair, they may convict the surveyor or party liable in a penalty not exceeding £5, and order the highway to be repaired within a limited time; and, if not repaired, the justices may, by a second order, direct that a sum, equal to the amount they upon evidence shall deem sufficient to repair the highway, shall be paid to a person appointed by them, which money is recoverable as a forfeiture, and to be applied in the repair of the highway. Where more persons than one are liable to repair, the justices shall direct the proportion to be paid by each. Where the highway is a turnpike road, the justices are to summon and proceed against the treasurer, surveyor, or other officer of such road. Where the obligation to repair comes in question, the justices have no power to interfere.^a

Where the obligation to repair is in dispute, the justices are to order an indictment^b to be preferred against the inhabitants or other person at the next assizes or quarter sessions, and the necessary witnesses to be subpcœnaed. The costs of the prosecution are to be allowed by the judge of assize,^c or

^a 5 & 6 Wm. IV. c. 50, s. 94. *George v. Chambers*, 11 M. and W. 149.

^b *Reg. v. Martin*, 3 Q. B. 1037.

^c *Reg. v. Clark*, 5 Q. B. 887.

the justices at quarter sessions, to be paid out of the highway-rate. The party indicted at quarter sessions may remove it into the Queen's Bench by certiorari.*

All fines, penalties, &c., are to be paid to such person, residing in or near the parish where the road lies, as the justices or court imposing the fine shall appoint, to be applied to the repair of the highways. The party receiving the fine, &c., is to obey the directions of the court or justices as to its application, under penalty of forfeiting double the sum. If any fine is levied on an inhabitant of any parish, the justices at special sessions may order him to be reimbursed out of the highway-rate.†

In recovering penalties, the justices proceed by summons,‡ distress, and sale; they may imprison or take security from the party convicted for his appearance at the return of the distress warrant; or if they think he has not sufficient goods whereon the forfeiture can be levied, or if the warrant cannot be executed, the justices may commit the party to the house of correction for not exceeding three calendar months, to be kept at hard labour.§

The justices, too, may give costs, either to the informer or the offender; and where the information is dismissed, the costs are to be levied by distress; and if they cannot be so levied, the offender may be committed to the house of correction and hard labour for not exceeding one calendar month.¶

If a party is dissatisfied with a rate or a conviction of justices, he may appeal to the quarter

* 5 & 6 Wm. IV. c. 50, s. 95.

† S. 96.

‡ S. 101.

§ S. 103.

¶ S. 97.

sessions,^a and the sessions may state a special case for the opinion of the Queen's Bench.^b

20. Turnpike roads are placed under the management of trustees, who are empowered to raise money by mortgage, and to levy tolls for the repair and improvement of such roads. The inhabitants of the parish, or parties liable by prescription, &c., are not discharged of their obligation by the road being made a turnpike road; but, on the contrary, they are the parties to be indicted if it be out of repair;^c though the Highway Act directs that proceedings shall be taken against the surveyor of the turnpike road when it is out of repair.^d

Repairs of
Turnpike
Roads.

And by statute 4 Geo. IV. c. 95, s. 80, all persons who are or shall be liable to do statute work, or are or shall be chargeable towards the repairing of any turnpike road, shall remain liable thereto in like manner as they now are, or have heretofore been. And any two justices of the peace for the county, &c., in which the road is situate, upon the application of three of the trustees, their clerk or surveyor, are to adjudge what proportion of statute work shall be done upon the turnpike road by the inhabitants of the parish through which it passes, and also what proportion of the money, received by the surveyor of the highways as a composition for statute labour, shall be paid to the trustees, &c.

By several temporary statutes, the justices at special sessions are empowered to order a portion

^a 5 & 6 Wm. IV. c. 50, s. 105.

^b S. 108.

^c Anon. Lloft. 465.

^d 5 & 6 Wm. IV. c. 50, s. 94.

of the highway-rate to be paid to the trustees of turnpike roads for the repair of such roads.^a

Of Bridges.

21. Public bridges, if not within a city or town corporate, are repairable by the inhabitants of the county; if within a city or town corporate, by the inhabitants of such city or town. If part in one shire, city, or town, and part in another, the inhabitants of the shire, city, or town, are bound to repair so much of the bridge as lies within their limits.^b A bridge may, by custom, be repairable by the hundred or parish in which it is situate;^c or an individual may by prescription be bound to repair, by reason of the tenure of lands.

How repaired.

22. Those who are bound to repair bridges, must make them of such height and strength as shall be answerable to the course of the water; and if it take a new channel, they must erect a bridge there.^d But they are not bound to widen the bridge, however convenient or necessary it may be to the public.^e Power is given by statute 43 Geo. III. c. 59, to the quarter sessions to widen and improve, and also to pull down, and rebuild in more convenient situations, bridges repairable by the county. If a bridge repairable by an individual *ratione tenuræ* be enlarged, the repairs

^a 4 & 5 Vict. c. 59; continued by 6 & 7 Vict. c. 59; 8 & 9 Vict. c. 59; 9 & 10 Vict. c. 49; 10 & 11 Vict. c. 93; 11 & 12 Vict. c. 66; Reg. v. Preston, 12 Jur. 1068.

^b 22 Hen. VIII. c. 5, s. 2 and 3. 2 Inst. 701.

^c Rex v. Hendon, 4 B. and Ad. 628.

^d 1 Hawk. P. C. c. 77, s. 1.

^e *Inhabitants of Cumberland v. Rex*, 3 B. and P. 354. *Rex v. Inhabitants of Devon*, 4 B. and C. 670. *Cont. Rex v. Inhabitants of Cumberland*, 6 D. and E. 194.

must be done by the individual and the county *pro rata*.^a

23. Counties are also bound to repair the high-ways at the ends of bridges for 300 feet.^b In the case of bridges built subsequent to the 20th of March, 1836, the approaches are to be repaired by the parish, except the walls, banks, and fences of the raised causeways, and the land arches thereof, which are to be kept in repair by the county.^c A corporation bound by prescription to repair a bridge is *primâ facie* bound to repair the approaches.^d Causeways to.

24. By 3 Geo. IV. c. 126, s. 107, where parishes are bound to repair bridges on turnpike roads which require amendment, the county and parish, by the authority of those competent to make rates, may contract together, so that the improvements and future repair of the bridges shall lie upon the county. Bridges on Turnpike Roads.

And by s. 108, the trustees of the turnpike roads may contract with the parish to repair the bridge, in consideration of an annual sum.

25. Every bridge which is of public utility is a public bridge, and *primâ facie* repairable by the inhabitants of the county.^e Although the bridge is erected by a private individual for his own private What a public Bridge.

^a *Rex v. West Riding of Yorkshire*, 2 East, 353, n.

^b 22 Hen. VIII. c. 5, s. 9. *Rex v. West Riding*, 7 East, 588. *West Riding of Yorkshire v. Rex*, 5 Taunt. 284.

^c 5 & 6 Wm. IV. c. 50, s. 21.

^d 43 Ass. 275. B. pl. 37. *Regina v. Mayor of Lincoln*, 8 Ad. and El. 65.

^e 2 Inst. 701. *Rex v. Inhabitants of West Riding, Yorkshire*, 5 Bur. 2594; 2 Bl. 685. *Rex v. West Riding*, 2 East, 342.

advantage, yet, if it becomes of public benefit, it is a public bridge. If a bridge be built of slight materials, or in an inconvenient situation, it may be indicted as a nuisance; but if no such proceeding be taken, and the public use it for any length of time, it is evidence of the bridge being a public utility, so as to charge the county with its repairs.^a But where a bridge, built in furtherance of private schemes, is erected as a compensation for injuries done to the former right of way of the public, the builder is bound to keep it in repair. As where the company for the navigation of the Medway, having deepened and destroyed a ford, built a bridge over where the ford was, it was held they were bound to repair it.^b And so, where a canal company made a cut through a highway, it was held that they were bound not only to build, but also to keep in repair a bridge over such cut.^c

By 43 Geo. III. c. 59, s. 5, no bridge built by an individual shall be deemed a county bridge, unless erected in a substantial and commodious manner, under the direction, and to the satisfaction, of the county surveyor, or person appointed by the justices at quarter sessions, or, in Lancaster, by the justices at the annual sessions; which surveyor, or person appointed, is to attend and superintend the erection of the bridge, when required by the party

^a *Rex v. Inhabitants of Glamorgan*, 2 East, 366, n. *Rex v. Inhabitants of Bucks*, 12 East, 192. *Rex v. Inhabitants of Kent*, 2 M. and S. 513.

^b *Rex v. Inhabitants of Kent*, 12 East, 220.

^c *Rex v. Inhabitants of Lindsey*, 1 East, 317. *Rex v. Kerri-son*, 3 M. and S. 526.

erecting the same; and if the builder be dissatisfied, the matter is to be determined at the quarter or annual sessions.

It has in some cases been questioned whether a particular bridge is a bridge repairable by the county, or a part of a highway repairable by the parish. A bridge has been defined as an erection built across a stream of water, flowing in a channel more or less defined; and it has been held that a raised causeway, leading to a bridge over a river, with arches through which the water flowed in times of flood, could not be considered as part of the bridge, but that the bridge must be taken to end at the ordinary high-water mark. It is clear that an arch thrown across a ravine, or over an ancient road, is not a county bridge.^a This rule, however, is only negatively true. Thus, although no archway or building can be a county bridge, unless it be erected across a stream of water, yet we cannot say that every archway across a stream is a county bridge. An archway passing over an inconsiderable streamlet, which has always been repaired by the parish, will be considered as part of the road. Whether or not an erection over a stream is a county bridge, is a question for the jury.^b

26. The charges of repairing bridges, and high-ways at the ends of bridges, are paid out of the general county rates.^c

Rates for and
Superintend-
ence of.

^a *Rex v. Inhabitants of Oxfordshire*, 1 B. and Ad. 289.

^b *Rex v. Inhabitants of Witney*, 4 N. and M. 594; 3 A. and E. 89.

^c 12 Geo. II. c. 29, s. 1.

The justices of the peace are to appoint two surveyors, with salaries, to see bridges amended.*

By statute 12 Geo. II. c. 29, s. 13, no money can be applied to the repair of bridges, until presentment be made by the grand jury, at the sessions or assizes, of their insufficiency, inconvenience, or want of reparation.

And by s. 14, after such presentment, the justices at quarter sessions may contract with any person to repair the bridges, &c., presented, for any term not less than seven years.

By 52 Geo. III. c. 110, two or more justices are to be appointed, who are to superintend the county bridge situate in their division, and order such immediate repairs as they may deem necessary, to the amount of £20.

And by s. 5, the quarter sessions may contract with the trustees of any turnpike road passing over the bridge, to keep in repair the roads over the bridge, and at the ends thereof, for any term not exceeding seven years, nor less than one year.

And by 55 Geo. III. c. 143, s. 5, the justices at quarter sessions may contract with any person to maintain and keep in repair the county bridges and approaches for any term of years not exceeding seven, nor less than one, although there has been no presentment, provided they previously give notice of their intention to contract in some public newspaper circulated in the county.

Materials.

27. There are several provisions as to procuring materials for the repairs of bridges, nearly similar

* 22 Hen. VIII. c. 5, s. 4.

to those relating to highways.^a And, by the Highway Act, the surveyor of county bridges is invested with all the same powers as to procuring materials for the repair of, and preventing nuisances, on county bridges and their approaches, as the surveyor of the highways has by that statute.^b

^a 43 Geo. III. c. 59; 54 Geo. III. c. 90; 55 Geo. III. c. 143.

^b 5 & 6 Wm. IV. c. 50, s. 22.

CHAPTER IX.

DILAPIDATIONS OF SEWERS, SEA WALLS, ETC.

1. Authority of Commissioners of Sewers.—2. Things subject to their Jurisdiction.—3. Obligation to repair by Ownership and Frontage;—4. By Prescription;—5. By Custom and Covenant;—6. By Tenure and Charter.—7. When Obligation excused.—8. Remedy for Breach.—9. Obligation on Public, in what Cases.—10. Who liable.—11. Party not benefited.
12. Distinct Levels.—13. Proportioning Rate between Out-going and In-coming Tenant.—14. Court of Sewers, Qualification of Commissioners.—15. Meeting of Commissioners.—16. Power of Court to order Repairs;—17. New Works;—18. To purchase Lands, &c.—19. Right to Soil.—20. Presentment by Jury.—21. Form of Presentment, &c.—22. Power to make Rate.—23. Enforcement of Decrees.—24. Quashing Decrees, &c.—25. Sewers of the Metropolis.

Authority of
Commissioners
of Sewers.

1. THE repairs of sewers, sea walls, &c., for draining lands and houses, and for preserving them from inundations, are under the superintendence of commissioners of sewers, appointed either by virtue of the general statutes of 23 Hen. VIII. c. 5, and 3 and 4 Wm. IV. c. 22, or of particular local Acts. By 23 Hen. VIII. c. 5, the King is empowered to grant a commission to substantial persons named by the lord chancellor, the lord treasurer, and the two chief justices, or any three of them, for keeping in repair walls and ditches upon marsh grounds on

the coasts of the sea, and for removing impediments to the navigation within any particular district. The commissioners have, by this statute, authority to survey all walls, streams, ditches, banks, gutters, sewers, gates, calcies, bridges, trenches, mills, mill-dams, flood-gates, ponds, locks, and hebbing-wears, and to cause the same to be made, amended, put down, or reformed, at their discretion; to inquire, by jury of the county, by whose default dilapidations or nuisances happen, and who hold lands or tenements which have had or may have hurt by reason thereof; to assess such persons towards the reparations of the dilapidations or removal of the nuisances in such manner as seems best to them; to repair and make walls, banks, ditches, gutters, sewers, gates, calcies, bridges, and streams, within their district, where necessary; to cleanse trenches, sewers, and ditches, and to abate mill-dams, streams, ponds, locks, fish-guards, and hebbing-wears. They are also empowered to make laws, acts, decrees, and ordinances, relating to walls, sewers, &c., which are to be engrossed on parchment, and certified, under the seals of the commissioners, into the Court of Chancery, and then have the King's royal assent.*

By the statutes of 13 Eliz. c. 9, and 3 and 4 Wm. IV. c. 22, s. 6, commissions of sewers are to continue in force for ten years from their date, notwithstanding the demise of the Crown; but a commission may be determined before that time, by the issue of a new commission, or by writ of supersedeas out of Chancery, discharging the commission.

And by 3 and 4 Wm. IV. c. 22, s. 7, laws, decrees,

* 13 Eliz. c. 9, s. 1 and 2.

acts, constitutions, and ordinances, made by a Court of Sewers, and duly registered in its rolls or books by the clerk to the commission, are to continue in force after the expiration or determination of the commission, and until the same are repealed by any subsequent court, although they are not engrossed on parchment, under the seals of the commissioners, and certified into Chancery, and the royal assent had.

Things subject
to their Juris-
diction.

2. The statute 3 and 4 Wm. IV. c. 22, s. 10, declares, that all walls, banks, culverts, and other defences, natural or artificial, situate or being towards the coasts of the sea, and all rivers, streams, sewers, and water-courses, which are navigable, or in which the tide ebbs and flows, or which directly or indirectly communicate with any navigable or tide river, stream or sewer, and all walls, banks, culverts, bridges, dams, flood-gates, and other works, erected or to be erected upon, over, or adjoining to any such rivers, streams, and water-courses, shall be from thenceforth within and subject to the jurisdiction of the commissioners of sewers. It provides, that nothing therein contained shall authorize or empower the commissioners to exercise authority or jurisdiction upon or over any dams, flood-gates, or other works erected for the purpose of ornament before the passing of the Act, in, upon, or over any rivers, streams, ditches, gutters, sewers, or water-courses, near or contiguous to any house, or in any garden, yard, paddock, park, planted walk, or avenue to a house, without the consent, in writing, of the owner first had and obtained.

The object of a commission of sewers is twofold;

firstly, to preserve the land from being inundated by the sea or land waters; secondly, to keep the navigation of rivers free and clear of obstructions. Their jurisdiction extends not only to navigable rivers, but to every water-course which communicates, directly or indirectly, with such rivers.*

The subjects of the commissioners' jurisdiction, specified by the statute, and which they are to see kept in repair, are the natural banks of the sea and of navigable rivers—walls, which are artificial erections to withstand the rage of the sea, or to keep rivers within their banks—calcies or causeways on the shore of the sea or banks of a river, which answer the same purpose—goats, which are doors or gates to carry off the waters after an inundation of the sea—ditches, gutters, and sewers, which drain off the waters after an inundation, and, by carrying land waters into a river, improve the navigation—bridges, which are sometimes useful to navigation, by keeping in the waters. Mill-dams, &c., the commissioners are empowered to remove, as impediments to navigation.

3. An individual, according to *Callis*, may be exclusively bound to support a sea wall, &c., by reason of frontage, ownership, prescription, custom, tenure, charter, or covenant.^b Frontage is, where a party is bound to repair because his lands front the sea, and abut upon the wall. Ownership is where he is bound because he owns the soil upon which the wall is built, and consequently the wall itself. It is very questionable whether an individual can

Obligation to
repair by
Ownership and
Frontage;—

* *Rex v. Hide*, Sty. 60. *Yeaw v. Holland*, 2 W. Bl. 717.
Dore v. Gray, 2 D. and E. 358. *Callis*, 75. ^b *Callis*, 115.

be compelled to bear the charges of repairing a sea wall, &c., merely by reason of frontage or ownership, since it is against the analogies of law, and the words of the statute, that a party should alone be obliged to repair a wall for the benefit of others, because his lands happen to be nearest the sea, or because the wall is built upon his ground. In *Rooke's case*^a it was held, that the commissioners had no right to tax the occupier of the land next adjoining a river for the whole repairs of the bank, but that they ought to tax all, who were in danger of being damaged by the non-repair, equally: *qui sentit debet commodum sentire debet et onus*. And in *Rex v. Commissioners of Sewers for Essex*,^b it appeared, that although the parties charged held lands next adjoining the wall, and were the owners of the wall, there was a prescription to charge them.

By Prescription;
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4. The obligation by prescription is, where an individual or corporation is bound to repair a wall, sewer, &c., from time immemorial. An individual can only be bound by reason of the tenure of certain lands. It may appear that he, and all those whose estate he has, have from time out of mind repaired the wall, yet he will not be bound merely because his ancestors have always done the repairs, since an ancestor cannot impose such a duty upon an heir. The obligation must be annexed as a condition to an estate in lands, so that all those taking the estate shall be bound to perform it. A corporation may be prescriptively bound to keep a wall in repair, without any consideration by tenure or otherwise.^c

^a 5 Rep. 99 b.

^b 1 B. and C. 477.

^c Callis, 116.

5. The obligation by custom is, where the inhabitants of a particular township, or other district, have immemorially kept a wall in repair; by covenant is, where a party agrees with the landowners or the commissioners to keep the wall, &c., in repair. And where a tenant of any of the lands bound agrees with other parties, or with his landlord, to do all the repairs, the commissioners may assess the whole amount upon him; but not so where a stranger agrees, because between him and the commissioners there is no privity, and he is not subject to their jurisdiction.^a

By Custom and
Covenant;—

6. The obligation may be by tenure, without prescription; as where lands within time of memory have been granted upon condition of repairing a sea wall.^b And so if the King grants a charter to a corporation upon condition that they repair, and they accept the charter, such acceptance renders them liable.^c

By Tenure and
Charter.

7. An individual bound by tenure to support a sea wall is bound only so long as his tenure continues; and therefore if the lands he holds are swallowed up by the sea, his obligation is determined.^d If the wall is destroyed by inevitable accident, and without any default on the part of those bound by prescription or custom, they are not obliged to rebuild, but the commissioners should assess the whole level.^e But if a small breach is

When Obliga-
tion excused.

^a March, 198.

^b Porter's case, 1 Rep. 26 a.

^c Mayor of Lyme Regis v. Henley, 5 Bing. 91. 3 B. and Ad. 77. 1 Bing. N.C. 222.

^d Callis, 145.

^e Callis, 146. Keighley's case, 10 Rep. 139 a. Rex v. Somerset Commissioners of Sewers, 8 D. and E. 312.

made in the wall, and the tenant neglects to repair it, and afterwards the wall is destroyed by a storm, he is bound to rebuild it, because timely repairs might have rendered it strong enough to withstand the storm.^a And it is said, that the tenants of lands on the banks of the Trent shall never be excused by reason of floods, because the Trent is not so violent but that the tenants, by policy and industry, may preserve the banks.^b

Remedy for
Breach.

8. Where, by the default of the party bound to repair, the danger becomes inevitable, and the commissioners assess all the landholders of the level towards the repairs, (as they may,) each landholder may have an action on the case against the party by whose default they have become liable.^c And if an individual or corporation is bound to repair a sea wall or sewer, it is a matter of public concern; and if he neglect to do so, he may be indicted, or any person who sustains damage in consequence may have an action on the case.^d

By 3 and 4 Wm. IV. c. 22, s. 15, in case any person, body politic or corporate, liable by reason of tenure, frontage, prescription, custom, covenant, or grant, to repair any walls, does not keep them in repair, and does not, after seven days' notice from the surveyor, dikereeve, or officer appointed by the Court of Sewers for that purpose, proceed to put the same in good repair with all

^a Moor, 73. *Rex v. Essex Commissioners of Sewers*, 1 B. and C. 477.

^b Moor, 69.

^c *Keighley's case*, 10 Rep. 139 b. *Mayor of Lynn v. Turner*, Cowp. 86. *Anon. Lofft*, 556.

^d *Mayor of Lyme Regis v. Henley*, 5 Bing. 91. 3 B. and Ad. 77.

reasonable dispatch, the surveyor, &c., may put the same into good and sufficient repair; and the expenses are to be paid by the party liable to repair.

There is nothing in the Act to prevent the commissioners from levying the expense on the district, which they must do where they are unable to obtain the amount from the party liable by tenure, &c.

The Court of Queen's Bench will not grant a mandamus to compel a party to repair, because the commissioners have the remedy in their own hands.^a

9. These special liabilities are exceptions to the general rule, that all parties benefited by the wall or sewer shall contribute towards its support. Obligation on Public, in what Cases. Where no person is bound by prescription, &c., the commissioners are empowered to raise the money necessary for making or repairing the sea walls, banks, or sewers, by assessment of those who are likely to receive damage if the repairs be not done. And such persons are in all cases ultimately liable where the special liability fails, as if a party bound by tenure to repair a sea wall dies without issue, whereby the land escheats, and the tenure is at an end; or if a corporation so bound is dissolved.^b And where the party liable is unable to repair, as if the land he holds is of inadequate value, and the commissioners have no means of enforcing him to do the repairs, they may charge the level.^c

10. The parties who the commissioners may tax Who liable.

^a Reg. v. Gamble, 11 A. and E. 69; a case on the powers of the Commissioners of Bedford Level.

^b Callis, 145.

^c Callis, 145. Rooke's case, 5 Rep. 100 a. Keighley's case, 10 Rep. 140 a.

for the support of a sea wall or sewer are all whose properties are benefited by the work, that is, all who hold lands protected by the wall, or drained by the sewer, whether the lands be copyhold or freehold; all who have any incorporeal tenement in the land, such as tithes, or common of pasture. And where a wall keeps a river within its bounds, and increases the volume of its water, they may be assessed who have franchises in the river, such as an exclusive right of navigation, or fishing.^a Crown lands are liable to contribute towards sewers by which they are benefited,^b if occupied beneficially by a tenant or officer.^c But property of which there is no occupier, as a public prison^d or hospital,^e is not rateable, because there is no person to be rated.

Party not benefited.

11. A party who derives no benefit from a sewer or wall cannot be assessed for work done thereon. Thus, where a house was situate on an elevation much above the sewer, the drains of the house communicated with the sewer, but if the sewer were stopped up, it would not injure the house, it was held that the commissioners could not assess the tenant.^f Any benefit, however small, is sufficient to render a party liable to assessment towards the

^a Callis, 120, 137. *Rooke's case*, 5 Rep. 99 b. *Keighley's case*, 10 Rep. 140 a. *Case of Isle of Ely*, 10 Rep. 142 b.

^b 23 Hen. VIII. c. 5, s. 9. 3 & 4 Edw. IV. c. 8, s. 2.

^c *Netherton v. Ward*, 3 B. and Ald. 21. *Soady v. Wilson*, 4 N. and M. 777. 3 A. and E. 248.

^d *Tracey v. Taylor*, 3 Q. B. 966.

^e *Neave v. Weather*, 3 Q. B. 984.

^f *Masters v. Scroggs*, 3 M. and S. 447. Vide also *Stafford v. Hamston*, 2 B. and B. 691. *Case of Whitechapel Commissioners of Sewers*, Lev. 288.

sewers'-rate; as in the case of Somerset House,^a the general benefit derived from the improved drainage of the neighbourhood, by which the approaches to Somerset House were rendered more commodious, was held sufficient to make an occupier rateable, although Somerset House had its own drainage, and made no use of the common sewer. If a sewer is likely to be beneficial to a house, though no actual benefit is derived therefrom, as where the tenant may use it if he will for drainage, it seems that he may be assessed towards its making and repairs.

12. Where there are several levels within the jurisdiction of one commission, which are drained by separate sewers, the sewers of one level being of no benefit to the inhabitants of another, the commissioners cannot assess the inhabitants of all the levels within their district towards the support of all the sewers, but must rate each level separately with the sums expended upon its own sewers.^b

And in conformity with this decision is the statute 3 and 4 Wm. IV. c. 22, s. 14, by which the commissioners may make separate rates, as occasion shall require, for every separate level, valley, or district, or any part of such level, &c., within their commissions, and fix the limits of every such level, &c., and appoint surveyors, or other officers, for every such level, &c., and keep separate accounts of all monies received by virtue of any rate made upon the lands within the level, &c., and of all

^a *Soady v. Wilson*, 4 N. and M. 777. 3 A. and E. 248.

^b *Rex v. Tower Hamlets' Commissioners of Sewers*, 9 B. and C. 517. See *St. Katherine's Dock Company v. Higgs*, 9 Jurist, 1030; 11 Jurist, 991.

payments in respect thereof, and apply the monies received from each distinct level, so as each level shall bear its own charges; and if any charges shall be incurred in respect of two or more levels, they shall be apportioned between such levels, in such manner as the commissioners shall deem fair and equitable.

Proportioning
Rate between
Out-going and
In-coming
Tenant.

13. As tenants often remove before they derive the full benefit of the outlay of their last sewers'-rate, the statute^a provides, that in such case the out-going tenant and the in-coming tenant shall respectively be liable to pay the rate in proportion to the time they each occupy the premises. The proportion, in case of dispute, shall be ascertained and settled by the Court of Sewers. No out-going tenant shall be allowed any greater amount of rate than shall have been actually paid by him, and not repaid by his landlord.

Court of Sew-
ers, Qualifica-
tion of Com-
missioners.

14. The qualification of the commissioners is fixed by 3 and 4 Wm. IV. c. 22. A commissioner must have in his own right, or in right of his wife, a freehold, or leasehold estate for sixty years, or on lives, of the clear annual value of £100; or a leasehold estate, originally granted for twenty-one years, of which ten years are unexpired, of £200; or be heir apparent to a person possessing an estate of £200 per annum; or be agent, appointed under the seal of a corporation, or of a person not acting as commissioner, who have lands of £300 per annum actually taxed under the commission. The lands which form the qualification may be either in the county to which the commission refers, or the ad-

^a 3 & 4 Wm. IV. c. 22, s. 18.

joining county.^a Quakers may act as commissioners.^b The commissioners are required to take an oath, or, if Quakers, to affirm,^c and are liable to a penalty of £100 if they act being unqualified. But the acting of a disqualified person does not affect the legality of the proceedings of the court.^d Ex-officio commissioners need not qualify.^e

15. The first meeting of the commissioners (or ^{Meeting of Commissioners.} court) may be convened by any three of the commissioners, or by the clerk, under the direction, in writing, of three commissioners, ten clear days' notice being given in some county newspaper generally circulated in the district, and the subsequent meetings are to be held at such time and place as the major part of the commissioners present at any meeting may appoint. To constitute a meeting there must be, at least, six commissioners present, and every order and determination must be concurred in by the major part of those present. They may elect a chairman, who has a casting vote.^f If a sufficient number do not meet, or the meeting is not duly adjourned, one commissioner may convene a meeting.^g

A special meeting, at an earlier day than that to which the last meeting stands adjourned, may be called by any three commissioners, or by the clerk, under their written direction, ten clear days' notice being given in some county newspaper generally circulated in the district. At this special meeting no other business than that specified in the notice can be transacted. In the event of any imminent

^a 3 & 4 Wm. IV. c. 22, s. 1. ^b S. 2. ^c S. 3. ^d S. 4.

^e S. 5. ^f S. 8. 4 & 5 Vict. c. 45, s. 10. ^g S. 12.

danger to be apprehended from unusually high tides or other cause, when, in the judgment of two of the commissioners, the exigency of the case will not admit of the delay of ten clear days' notice of meeting, the two commissioners, or the clerk, by their direction, in writing, may by circular letter convene a meeting at as early a day as they may deem necessary, the letter to state the object of the meeting, and no other business to be transacted.^a

The Court of Sewers may be held at any place not exceeding ten miles from the limits of the commissioners' district.^b

Power of Court
to order Re-
pairs ;—

16. The commissioners of sewers are a court of record ; and in determining on the expediency of repairs to sea walls, sewers, or other subjects of their jurisdiction, have an uncontrollable authority, no other tribunal being so competent to decide such questions. In these cases the commissioners act upon their own view and discretion, with the assistance of their surveyor.^c

And the statute 3 & 4 Wm. IV. c. 22, s. 13, enacts, that when a jury has presented the persons liable to repair, or contribute to the repair of any defence, wall, &c., there must be no presentment as to any subsequent defects of repair ; but the court may direct the same to be repaired by the parties liable. The court have, by a subsequent section,^d the option of ascertaining such matters by the presentment of a jury.

^a 3 & 4 Wm. IV. c. 22, s. 9.

^b S. 44 and 45. 4 & 5 Vict. c. 45, s. 11.

^c Callis, 107. *Rex v. Tower Hamlets' Commissioners*, 1 B. and Ad. 232.

^d 3 & 4 Wm. IV. c. 22, s. 17.

17. The court may make new works for securing New Works;— lands within their jurisdiction against the overflowing of the sea, or for draining off superfluous fresh waters, according to their wisdom and discretion; and may also direct former walls, sewers, &c., to be abandoned in lieu thereof. In such cases the court are to direct an inquiry and presentment by jury, to ascertain the manner and proportions in which such new works shall be repaired by the parties deriving advantage or avoiding damage thereby, having regard to the former works abandoned.^a

But the court cannot make new works where none have been before, without the consent, in writing, certified to the court, of the owners and occupiers, their husbands, guardians, trustees, or feoffees, committees, executors, or administrators, of at least three-fourth parts in value of the lands and hereditaments lying within the district proposed to be charged with the costs of such works.^b

Before this statute, it was held that the commissioners' power was not confined to the repair of old walls, sewers, &c., but that they might rebuild walls, &c., if they deemed it expedient, in a different form.^c And it was thought that they might make a new wall or drain where none was before.^d But they had no authority to divert the course of a river, because of the great interference with the property of individuals.^e

^a 3 & 4 Wm. IV. c. 22, s. 19.

^b S. 21.

^c March, 198. *Rex v. Somerset Commissioners of Sewers*, 8 D. and E. 312.

^d *Callis*, 92.

^e *Case of Isle of Ely*, 10 Rep. 101 a. *Case of the Inhabitants of Outwell*, Sty. 192.

They may in their discretion alter the drainage so as to unite the sewers of different levels; and although the alteration may not be beneficial to one of the levels, yet, if the united sewers are, the occupiers of such level may be rated to the repairs of the united sewers.^a

In the removal of nuisances to a navigation, the commissioners have authority to determine what is a nuisance, and to remove it, but they cannot remove an impediment to which a party has gained a prescriptive right.^b If they erect a wall for the protection of lands within their district, which causes the sea to beat with additional violence on the neighbouring lands, the Court of Queen's Bench will not compel them to make compensation to the proprietor of those lands, or to continue the wall so as to include them, but he himself must take precautions to preserve his land from the sea.^c Where particular parties, by order of the commissioners of sewers, rebuilt a sea wall which had been destroyed by the unusual violence of the sea, and the commissioners decreed that the owners of land within the level should reimburse the builders of the wall their proportions of the amount expended, the Court of King's Bench would not compel succeeding commissioners to enforce the decree, which had expired with the commission; saying, that the only course was to apply to the new commissioners to re-enact

^a *St. Katherine's Dock Company v. Higgs*, 9 Jur. 1030; 11 Jur. 991.

^b *Case of Chester Mills*, 10 Rep. 137 b. Vide *Kerrison v. Sparrow*, Coop. C. C. 305.

^c *Rex v. Pagham Commissioners of Sewers*, 8 B. and C. 353.

the law ;^a which, of course, implied that they had a discretion to judge as to the necessity of the rebuilding, and of the obligation of the inhabitants of the district to contribute.

18. Incidental to the power to make new works, ^{To purchase Lands, &c.} is the power to purchase lands. The commissioners may agree with any person for the purpose of widening, deepening, strengthening, maintaining, repairing, and amending any rivers, streams, water-courses, walls, banks, and other works, aids, and defences, within their jurisdiction, and for the loss or damage which the owners of lands, &c., may sustain from such works.^b That is, where the works of the commissioners cause any prejudice to particular lands, the parties may agree for compensation, though the statute apparently makes it the duty of the party to receive compensation as if he had a right to demand it, and does not oblige the commissioners to give compensation; which it should have done, seeing that if the works of the commissioners cause damage to any person, they being done in pursuance of a public duty, there is by the common law no right in the individual injured to demand compensation.^c Perhaps under this clause the commissioners would be bound to award compensation in cases like that of the Pagham Commissioners of Sewers.

There are provisions relating to the conveyance of

^a *Rex v. Somerset Commissioners of Sewers*, 9 East, 109.

^b 3 & 4 Wm. IV. c. 22, s. 24.

^c *British Cast Plate Company v. Meredith*, 4 D. and E. 794. *Boulton v. Crowthor*, 2 B. and C. 703. *Rex v. Pagham Commissioners of Sewers*, 8 B. and C. 353, post, cap. 10.

lands to the commissioners,^a and the property in lands purchased is vested in the commissioners.^b It is provided, that the amount of purchase money, or recompense agreed upon or assessed, shall be levied upon the property which receives benefit or avoids damage from the works for which the lands are purchased, or which cause the damage.^c

The commissioners cannot take down, remove, or make use of any house, building, garden, yard, paddock, or park, planted walk, avenue to a house, enclosed ground, planted as an ornament or shelter to a house, or planted or set apart as a nursery for trees, without the consent, in writing, of the owner.^d

Where land vested in the commissioners is not required by them, any six of them may sell it, and the proceeds of the sale shall be applied towards the maintenance of the works within the district in which the land sold is situate. In the first instance, the land must be offered to the proprietor of the adjoining land; and it is only in the event of his refusing to take it, that the commissioners can sell to another. If he and the commissioners cannot agree about the price, it shall be settled by a jury.^e

The Court of Sewers also may borrow money at interest for the carrying on their works, or payment of expenses, and may give security by a decree of the court, or certificate under the hands and seals of six commissioners.^f

Right to Soil. 19. Where, in cleansing any river, sewer, or

^a 3 & 4 Wm. IV. c. 22, s. 25, 26.

^b S. 47. *Stracy v. Nelson*, 12 M. and W. 535.

^c 3 & 4 Wm. IV. c. 22, s. 30.

^d S. 37.

^e S. 39.

^f S. 41. 4 & 5 Vict. c. 45, s. 4, 5, and 6.

water-course, gravel, soil, &c., is deposited and cast, by the order of the commissioners, on the banks, the occupier of the land next adjoining the banks may take the gravel, soil, or sand, for his own use within six calendar months after it is so deposited. If rushes, flags, or weeds are so deposited, he may take them within six weeks; but he must remove such gravel, rushes, &c., at least ten feet from the land side of the banks of the river, sewer, or water-course.^a

If the occupier neglect to remove the gravel, &c., within the limited time, the surveyor may enter upon his land with all necessary conveyances and implements, and remove it. If the occupier require the commissioners to remove the gravel, they must order its removal within six weeks after his request.^b

20. Questions of fact, not ascertainable by view, the commissioners cannot decide upon their own discretion, but must make inquisition by jury. Thus a jury must be summoned to ascertain who will be benefited by any projected work, or who holds lands within the district benefited, and the quantity of their lands.^c In the case of a nuisance to navigation, a jury must determine who is guilty of erecting or maintaining the nuisance.^d

In proceeding by presentment of jury, six or more of the commissioners issue a warrant, under their hands and seals, to the sheriff or bailiff of the county, city, or franchise, within the limits of their commission, and he summons, empannels, and returns, at the time and place named in the warrant,

^a 3 & 4 Wm. IV. c. 22, s. 22.

^b S. 23.

^c S. 19.

^d Callis, 108, 111.

a jury of from fourteen to forty-eight persons, who are qualified and usually summoned to serve on grand juries at quarter sessions. The jury are bound to attend the Court of Sewers at the time and place named, and at every adjournment of the court until discharged; and being sworn, they proceed on their inquiry, in the presence of the court, upon the evidence of witnesses. The commissioners may also summon witnesses. Notice of the inquest is to be fixed at the door of every church and chapel in the parishes affected by the inquiry; and if no church, then at some conspicuous public place, at least seven days before the inquisition, and to be inserted at least seven days before the inquisition in a public newspaper circulated in or near the limits of the commission.^a

Where the commission of sewers extends into two counties, or into a county and a city being a county of itself, the inquisition is by a jury of each county, &c. In the latter case, where the two juries do not agree, the sheriff of the county and the officer of the minor jurisdiction may be each directed to return from eighteen to nine jurymen; and from the names returned, nine of each are to be drawn by the clerk of the commissioners, which eighteen are to decide the difference.^b

The jury must be summoned by the sheriff or other officer from the body of his county or bailiwick, and not from any particular district; and if thus improperly selected, their presentments are void;^c and so are the presentments of a standing

^a 3 & 4 Wm. IV. c. 22, s. 11.

^b S. 12.

^c Birkett v. Crozier, 3 C. and P. 63.

jury.^a The Court of Sewers may recompense the jurymen for their expenses and loss of time.^b Parties rated, or liable to be rated, are competent witnesses.^c

21. The jury may present a whole district benefited, as Fore Street, without specifying the names of the individual proprietors.^d But it seems by the statute, that they ought to state the proportion in which each party is benefited;^e though, perhaps, where they present a district benefited, it may be presumed that every part is equally benefited, and the names of the persons having property in the district, and the quantity of their property, may be matter for subsequent inquiry.

Form of Presentment, &c.

It is not necessary for the sewers' jury, bailiff, surveyor, &c., to present each person liable separately; but they may present, in one presentment generally, the whole of the wall to be dilapidated, and all the persons liable to the repairs. And upon twenty-eight days' notice of such presentment, given to any party presented as liable, he may traverse his liability, and the trial of the traverse shall be had in the same manner as if he were presented alone.^f

A party interested may traverse the presentment, and if his traverse is informal, the Court of Sewers ought to allow an amendment.^g He is not concluded by the presentment, although he do not

^a *Rex v. Somerset Commissioners of Sewers*, 7 East, 71.

^b 4 & 5 Vict. c. 45, s. 7.

^c S. 8.

^d *Warren v. Dix*, 3 C. and P. 71, n.

^e 3 & 4 Wm. IV. c. 22, s. 19.

^f S. 46.

^g *Reg. v. Tower Hamlets' Commissioners*, 5 Q. B. 357.

traverse it; he may dispute the right of the commissioners to distrain in an action of trespass.^a

Power to make
Rate.

22. When the commissioners have thus ascertained who are benefited by their works, they may proceed to rate those parties. If they have jurisdiction, the Court of King's Bench will not inquire whether they have properly exercised it in levying a particular rate, since that would often be a matter of too much nicety and difficulty to determine.^b The rate may be retrospective for monies already expended, and may include sums necessarily spent in litigation.^c It is said by Callis that they may rate a township generally, and levy the whole amount on the goods of any inhabitant of the township;^d but this has been often denied, and it has been determined that the rate ought to specify the individuals rated, and the amount assessed upon each.^e Or it may be on lands, without naming the owners or occupiers where they are not known.^f According to Callis, where the works are of a permanent and substantial character, as well the lessor as the occupier should be rated; but for the reparation of ordi-

^a *Stafford v. Hamston*, 2 B. and B. 691. 5 Moo. 608. *Warren v. Dix*, 3 C. and P. 71, n., contra.

^b *Soady v. Wilson*, 4 N. and M. 777. 3 A. and E. 248.

^c *Rex v. Tower Hamlets' Commissioners of Sewers*, 1 B. and Ad. 322. *Case of the Level of Hull*, 2 Str. 1127.

^d *Callis*, 122.

^e *Case of Isle of Ely*, 10 Rep. 143 a. *Hetley v. Boyer*, Cro. Car. 336. 2 Bulst. 199. *Case of Inhabitants of Outwell*, Sty. 179. *Emmerson v. Saltmarshe*, 7 A. and E. 260. Per Lord Denman, *Tracy v. Taylor*, 3 Q. B. 982.

^f *Bow v. Smith*, 9 Mod. 94; 2 Eq. Cas. Ab. 206. See case of the Level of Hull, 2 Strange, 1127.

nary dilapidations, the occupier alone should be charged.^a But in this matter it would seem the commissioners may act at their discretion. And it seems that a tenant is entitled to deduct the ordinary sewers'-rate from his rent, unless he agrees with his landlord to pay it.^b

The Court of Sewers may tax in the gross lands within their jurisdiction, in proportion to the benefit received by the lands from the court, for the purpose of paying clerks and witnesses, for surveying, litigation, and other contingent expenses.^c They may direct an apportionment by their surveyor amongst the occupiers of lands chargeable,^d which apportionment is final, if not complained of at the next court.^e They may quash or amend rates.^f

23. For the enforcement of their decrees, they may fine the party in default; and for compelling payment of a rate, they may distrain and sell the goods of the party refusing or neglecting to pay;^g or they may assign the lands in respect of which the charge is assessed, either for years, for life, in fee or in tail, for payment of the sum assessed.^h This provision is extended to copyholds.ⁱ They have also power to levy fines by warrant,^j and to decree costs.^k Where a township is bound to repair, and fails to do so, the township may be amerced. The amercement need not be on indi-

Enforcement of
Decrees.

^a Callis, 140.

^b Palmer v. Earith, 14 M. and W. 428.

^c 4 & 5 Vict. c. 45, s. 1.

^d S. 2.

^e S. 3.

^f S. 7.

^g 7 Anne, c. 10, s. 3.

^h 23 Hen. VIII. c. 5, s. 8.

ⁱ 7 Anne, c. 10, s. 1.

^j 3 & 4 Wm. IV. c. 22, s. 53.

^k S. 55.

viduals; there is a distinction in this respect between an amercement and an assessment.^a

Quashing Decrees, &c.

24. If they exceed their jurisdiction, their orders may be removed into the Court of Queen's Bench by certiorari, and quashed; or if they neglect their duty in a matter where they have no discretion, but are merely ministerial, as if they refuse to enforce a decree for the benefit of an individual, regularly made and enforceable, they may be compelled to do so by writ of mandamus.^b The Court of Chancery may, by injunction, restrain them from exceeding their jurisdiction,^c though it will not ordinarily interfere, because there is a shorter and better remedy at law by certiorari.^d

Sewers of the Metropolis.

25. The Commission of Sewers for Westminster, Southwark, and parts of Middlesex, Surrey, Essex, and Kent, not more than twelve miles in a straight line from St. Paul's cathedral, is regulated by the stat. 11 & 12 Vict. c. 112, which is to continue in force for two years from the passing thereof, (Sept. 4, 1848,) and thence to the end of the then next session of Parliament. By this statute the Acts of Parliament relating to the sewers of Holborn and Finsbury,^e Westminster, and parts of Middlesex,^f and Surrey, East Mouldsey to Ravensbourne,^g are repealed.

^a Ramsey v. Nornabell, 11 A. and E. 383.

^b Case of Cardiff Bridge, 1 Salk. 146.

^c Birley v. Constables of Chorlton, 3 Beav. 499.

^d Kerrison v. Sparrow, Coop. 305.

^e 18 Geo. III. c. 66; 54 Geo. III. c. 219.

^f 47 Geo. III. Sess. 1, c. 7; 52 Geo. III. c. 48; 7 and 8 Geo. IV. c. 23; 10 and 11 Vict. c. 70.

^g 49 Geo. III. c. 183; 50 Geo. III. c. 144; 53 Geo. III. c. 79; 10 and 11 Vict. c. 217.

The stat. 11 and 12 Vict. cap. clxiii. regulates the sewers of the city of London. This statute came into operation on the 1st January, 1849, and is to continue in force for two years from that date, and thence to the end of the then next session of Parliament. By it the former statutes^a relating to the sewers of the city have been repealed; but the statutes of 11 & 33 Geo. III. and of 4 Geo. IV. are to revive on its expiration.

The statutes 3 & 4 Wm. IV. c. 22, and 4 & 5 Vict. c. 45, do not extend to the Commission of Sewers for the Metropolitan District to which the 11th and 12th Vict. c. 112 applies; nor to sewers under local Acts; nor to the customs of Romney Marsh or Bedford Level;^b nor to the sewers of the city of London.^c

^a 19 Car. II. c. 3; 11 Geo. III. c. 29; 33 Geo. III. c. 75; 4 Geo. IV. c. 114.

^b 3 & 4 Wm. IV. c. 22, s. 61; 11 and 12 Vict. c. 112, s. 144.

^c 3 & 4 Wm. IV. c. 22, s. 62.

CHAPTER X.

NUISANCES.

1. Definition of a Nuisance, and Division of the Subject.—2. Acts injurious to private Possessions; Breaking through Partitions.—3. Offensive Trades.—4. Disturbance in the Occupation of Lands.—5. Diversion of Water.—6. Protection of Lands from Inundation.—7. Injuries to Foundations.—8. Neglects injurious to private Possessions; Non-repair of Partitions, &c.—9. Destructive Animals.—10. Easements, how acquired; by Grant;—11. By Prescription.—12. Interruption of Prescription.—13. Effect of Alteration on Prescription.—14. Appendancy of Prescription.—15. Nuisances to Windows.—16. Nuisances to the Public; Obstruction of a Highway.—17. Offensive Trade.—18. Dangerous Nuisance.—19. Protection of Premises by Spring-guns.—20. Nuisance legalized by Pre-occupation;—21. By Licence;—22. By Prescription;—23. By Statute.—24. Nuisances by Public Authorities, Companies, &c.—25. Remedy for Nuisance.

Definition of
a Nuisance,
and Division of
the Subject.

1. In this chapter it is proposed to state the law relating to nuisances in the use and management of lands, a branch of law which is particularly interesting to persons engaged in the business of building. A nuisance may be defined to be a wrongful act or neglect of one man, in the use or management of his land, which occasions damage to the possession or easement of his neighbour, or to a

public easement. Considered with reference to the agent, nuisances may be divided into acts or breaches of negative duties, and neglects or omissions of positive duties; with reference to the patient, into injuries to private possessions, to private easements, and to public easements. The plan of this chapter is to state,—1st, The acts and neglects which are nuisances as injurious to private possessions; 2ndly, Those which are nuisances to private easements; 3rdly, Those which are nuisances as injurious to public easements; 4thly, The exceptions to the law against nuisances; and, 5thly, The remedies provided by law in cases of nuisance, and by and against whom such remedies may be pursued.

2. Any act done by one man on his land which is the cause of an encroachment on that of another, to his damage, is an actionable nuisance. Thus in *Edwards v. Hallinder** the plaintiff occupied a cellar, and the defendant a warehouse over it. The plaintiff placed so great a weight of goods in his warehouse, that the floor gave way, and the goods fell through into the cellar, and damaged some wine which the plaintiff had there. The defendant pleaded that the warehouse was let to him to hold thirty tons' weight, and that he only placed fourteen tons there, and that it fell in because the floor was rotten and the walls decayed. This was held no answer, because it appeared that the floor fell in by reason of the goods being placed there by the defendant; and though it were ruinous when the

Acts injurious
to private Possessions;
Breaking
through Partitions.

* Popham, 46. 2 Leonard, 93.

defendant took it, yet he should have taken care not to have overloaded it.

If, in consequence of an act done in one colliery, damage is caused to another, though at some distance, an action lies by the owner of the colliery injured.^a The London Dock Company excavated a dock near to plaintiff's wall; by the action of the water the wall was undermined and fell; the Company were held liable to an action.^b In another case, where the defendant had a channel in his own field, through the banks of which, when filled, the water percolated into the land of the plaintiff, and the plaintiff built a new house on his land below the current of the percolating water, it was decided that the defendant could not justify filling his channel with water, if it thereby injured the house of the plaintiff.^c

In these cases the act of the defendant caused an entry or encroachment into the land of his neighbour, by the goods through the floor, the water under ground; and such entry, being injurious to the neighbour, constituted a nuisance.

Offensive
Trades.

3. In determining what acts are nuisances, it is necessary to ascertain the legal extent of the possessions of an occupier of land. He to whom the soil belongs is entitled to all the space of air above to the sky, and of the earth below to the centre. His rights extend perpendicularly above and below

^a Com. Dig. Action on Case A.

^b Gillon v. Boddington, 1 Car. and Payne, 541. Ry. and Mood. 561. Staffordshire Canal Company v. Hallen, 6 B and C. 317; 9 D. and R. 266.

^c Cooper v. Barber, 3 Taunt. 99.

his own land, and not laterally, so as to claim any use from the earth beneath or the air above the adjoining land. It is therefore not only a nuisance to cause an encroachment or injury to the soil of a neighbour, as if a house is built overhanging the land of another ;^a but also if the air over his land is corrupted or disturbed by noisome smells or deafening noises, it is a nuisance.

Not every disagreeable smell or noise which spreads from one man's land to his neighbour's is actionable. The smell or noise must arise from some permanent cause, and occasion continual annoyance and discomfort, to a degree sufficient to depreciate the value of a dwelling-house, and render it less eligible in consequence of the neighbourhood. A man is not restricted in the fair and reasonable use of his land by any delicacy of sense or peculiarity of habit of his neighbour. A swine-sty,^b lime-kiln,^c privy,^d smith's forge,^e tobacco mill,^f tallow furnace,^g and glass-house,^h set up near a private residence, are nuisances. And so a mill for steeping sheep-skins, by which the air is corrupted ;ⁱ a building for manufacturing acid spirit of sulphur,

^a Penruddock's case, 5 Rep. 100 b. Baten's case, 9 Rep. 53 b. Fay v. Prentice, 1 C. B. 828.

^b Aldred's case, 9 Rep. 57 b.

^c Regina v. Wigg, 2 Ld. Raym. 1163. 2 Salk. 460.

^d Jones v. Powell, Hut. 136. Palm. 536.

^e Bradley v. Gill, Lutw. 69.

^f Styan v. Hutchinson, S. N. P. 1116, 7th edit.

^g Morley v. Pragnall, Cro. Car. 510.

^h Rex and Regina v. Wilcox, 2 Salk. 458.

ⁱ Rex v. Pappineau, 1 Str. 686.

which occasions noisome and offensive smells;^a a place for slaughtering horses.^b It is not essential that the stench raised should be unwholesome; it is sufficient if it renders the enjoyment of life and property uncomfortable.^c

But where the defendant was indicted for erecting furnaces and ovens for burning coke, and it appeared that the sulphurous smoke was offensive to the inhabitants of the adjoining houses, and their furniture was spoiled, and that flakes of fire often came from the flue of the furnace, Heath, J., directed an acquittal, because it did not appear that the grievance was injurious to the general health of the inhabitants, or that their houses were rendered uncomfortable or untenable.^d It is said, that if a schoolmaster keep a school so near the study of a lawyer as to disturb the meditation necessary to carry on his profession, no action will lie.^e And where it appeared that defendant kept six or seven pointers near the plaintiff's dwelling-house, whereby he and his family were prevented from sleeping at night, and very much disturbed during the day, the jury found for the defendant, and the Court of King's Bench refused a new trial.^f It is not an actionable nuisance to open a window, whereby the privacy of a neighbour is disturbed. In this case there is no encroachment whatever upon his pos-

^a *Rex v. White*, 1 Bur. 333.

^b *Rex v. Watts*, 2 Car. and Payne, 486. 1 Moo. and Malk. 281.

^c *Rex v. White*, 1 Bur. 333. *Rex v. Neil*, 2 Car. and Payne, 485.

^d *Rex v. Davey*, 5 Esp. 217.

^e Wood's Inst. 528, edit. 1728.

Street v. Tugwell, S. N. P. 1116, 7th edit.

sessions. He, of course, may build against the window.^a

4. Any wilful and mischievous act of one man which disturbs another in the enjoyment of the reasonable profits of his land is a nuisance, though without the malicious motive of the agent the act is innocent. Thus where the plaintiff was possessed of a stone-pit, and the defendant threatened the workmen and the buyers with maihems and suits at law, so that they were deterred from working or buying, it was held an actionable injury.^b And so where one man threatened the tenants at will of another, whereby they left his lands.^c Where the plaintiff erected a decoy on his lands, and the defendant went with a gun and fired at the wild fowl, for the purpose of frightening them away from plaintiff's decoy, and did thereby frighten them, it was held actionable; the decoy being in the nature of a trade, to the fair and reasonable use of which the plaintiff was entitled; and although he had no property in the wild fowl, yet he had a right to be protected against any malicious or mischievous act of another, which rendered his decoy less profitable.^d But no action will lie for firing guns and frightening rooks from a rookery, because they are birds of which no profit can be

Disturbance of
Occupation of
Lands.

^a 3 Campb. 82.

^b Garrett v. Taylor, Cro. Jac. 567. Rol. Rep. 162.

^c Rol. Abr. 108. Vin. Abr. Actions, Case N. c. vol. ii. p. 10. Bac. Abr. Actions on the Case F. Black. Com. vol. iii. p. 242. 9 Hen. VII. 7, 8; 21 Hen. VII. 32; 12 Hen. VI. 4.

^d Keeble v. Hickeringill, 11 East, 574, n. Carrington v. Taylor, 11 East, 571. See Tarleton v. M'Gawley, Peake, 270.

made, and are mentioned as destructive animals in several ancient statutes.^a

Diversion of
Water.

5. It is also a nuisance to the occupier of the land over which it flows to obstruct or divert a stream of water. By this act a natural profit is prevented from coming to the land. "The proprietor of land on each bank of a stream is *primâ facie* entitled to half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream, and, consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor. No proprietor can either diminish the supply of water, which would otherwise descend to the proprietor below, or throw it back upon the proprietor above."^b By grant, or by prescription, a proprietor may acquire a right to take the water, to the prejudice of the other proprietors of land on the banks of the stream; but by merely appropriating to himself water which is not at the time useful to the other proprietors, he acquires no such right. Thus, a person who first builds a mill on the banks of a stream has no right to pen back or divert the water for the supply of his mill, so as to diminish the quantity of water which would come to the proprietors below, on the ground that they have not applied the stream to any particular use.

^a *Hannam v. Mockett*, 2 B. and C. 934. 4 D. and R. 518.

^b *Verba*. Sir J. Leach, V.-C. *Wright v. Howard*, 1 Sim. and Stu. 190. *Mason v. Hill*, 3 B. and Ad. 304. 5 B. and Ad. 1. 2 Nev. and Man. 747.

To an artificial stream of water made for a temporary purpose, the person over whose lands it flows can acquire no rights against the person causing it by user. His user of the water imposes no obligation on the person causing it to continue its stream. He uses it as a temporary water-course. As where a sough was made for draining a mineral field on which the plaintiff erected mills, and the water was diverted from the sough by another sough made for draining the same field, it was held that the plaintiff had no right of action against the parties making the new sough.^a In other respects, artificial water-courses have the same legal incidents as natural ones, and a person who has appropriated the water of an adit made for draining mines, for twenty years, may maintain an action against another for corrupting the water to his injury.^b

In public navigable rivers no right can be gained, even by prescription, to divert or obstruct the stream, to the prejudice of the public.^c All that the proprietor of the land on the banks (and to whom the soil belongs, to the middle of the river) can do, is to take so much water as may be necessary for his private purposes by pipes,^d or otherwise, so as not sensibly to diminish the quantity, to the prejudice of the navigation.

^a Arkwright v. Gell, 5 M. & W. 203.

^b Magor v. Chadwick, 11 A. & E. 571.

^c Hale de Jure Maris, p. 9. Vooght v. Winch, 2 B. and Ald. 662.

^d Vide Rex v. Directors of Bristol Dock Company, 12 East, 429. Mason v. Hill, 5 B. and Adol. 24.

Nuisances to water may be either by diminishing the quantity or deteriorating the quality of the water which ought to flow to the proprietors below, or by throwing it back, so as to flood the lands of the proprietors above. Where the injury complained of is throwing back the water, no action can be sustained, unless the party has suffered actual damage by his lands being flooded, or his banks destroyed, &c.^a But for a diversion of the stream to the diminution of the complainant's quantity of water, it seems an action may be sustained for the violation of the right, though there be no actual damage.^b Where a dam was erected, by which the stream was diverted, but returned to its regular course long before it reached the plaintiff's mill, and there was no waste of water, but the supply to the mill was not so regular as before, it was held to be an actionable nuisance.^c Where a mill-dam of right pens back water upon the adjoining lands, and injures them, but, in consequence of the dilapidation and defective construction of the mill wheels and waste-gates, the mill-pond is at seasons exhausted, so that the adjoining lands are relieved from the stagnating water, it seems that the miller may repair and improve the mill wheels, though the waters are thereby penned back for a longer time, and occasion greater damage to the adjoining lands.^d

^a *Williams v. Morland*, 2 B. and C. 910. 4 D. and R. 583.

^b *Mason v. Hill*, 5 B. and Adol. 26. *Bower v. Hill*, 1 Bing. N. C. 549.

^c *Shears v. Wood*, 7 Moo. 345.

^d *Alder v. Savill*, 5 Taunt. 454.

6. Where the ancient course of water is to flood certain lands at certain seasons, the owners of those lands cannot justify fencing it off their lands, to the prejudice of other property ; though, if such be not the ancient course of the waters, they may. Thus if a river periodically inundates the surrounding country at certain places, the parties whose lands are thus periodically subject to floods have no right to protect their lands against the river, if they thereby cause the waters to flood the lands of their neighbours, because by such act they improve and increase the value of their property at the expense of their neighbours.^a But against inundations of the sea a party may protect himself, though he thereby cause the sea to beat with greater violence upon the adjoining land ; for the sea is a common enemy, and does not, like a river, inundate and recede from lands at regular intervals, but swallows up the land altogether. And by protecting himself against the sea, a party does not improve, but merely prevents his land from deteriorating.^b And upon the like principle, a party may protect himself from extraordinary and unaccustomed inundations of a river.^c

Protection of
Lands from
Inundation.

7. A man who builds a house on the verge of his own land has no right to the support of his neighbour's land for the foundation of his house ; nor if he build against the wall of his neighbour's house,

Nuisances to
Foundations.

^a *Rex v. Trafford*, 1 B. and Ad. 874.

^b *Rex v. Pagham Commissioners of Sewers*, 8 B. and C. 355.
Vide *Rex v. Tindall*, 6 Ad. and El. 143. 1 Nev. and Per. 719.

^c *Trafford v. Rex*, 8 Bing. 204 ; 1 Moo. and Scott, 401 ; 2 C. and J. 265 ; 2 Tyr. 201.

has he any right to the support of such wall; and if he place windows looking towards his neighbour's land, he cannot complain if his neighbour build so as to obstruct the light. Therefore if Thomas dig into his land so as to weaken the foundation of a house erected on the adjoining land of John, no action lies; though if Thomas dig so deep into his land that John's land, though it had no additional superincumbent weight upon it, would fall away, an action will lie.^a And so if he undermine John's house.^b Where the surface is granted, reserving the mines, the reservation will be construed so as to oblige the grantor in working the mines to leave a sufficient support for the surface.^c Where the governors of St. Thomas's Hospital pulled down a house in Honey Lane, next to Peyton's house, by reason whereof Peyton's house fell, it was held not an actionable injury, because there was no evidence from which a grant to Peyton of the right of support of the adjoining house could be inferred, and therefore there was nothing to prevent the governors pulling down their house, and nothing to impose upon them the duty of taking precautions against Peyton's house being injured.^d In *Wyatt v. Harrison*,^e the plaintiff declared that he was possessed of a house contiguous to and next

^a Rol. Abr. Trespass, I. *Wilde v. Minsterlet*, 2 Rol. Abr. 556. Com. Dig. Action on Case for Nuisance, A.

^b *Slingsby v. Barnard*, 1 Rol. Rep. 430.

^c *Harris v. Ryding*, 5 M. and W. 60.

^d *Peyton v. Mayor of London*, 9 B. and C. 725. *Wigford v. Gill*, Cro. El. 269. *Massey v. Goyder*, 4 C. and P. 161.

^e 3 B. and Adol. 871.

adjoining the house of the defendant, and that the defendant dug into the soil and foundation of his house so near to that of the plaintiff, that the plaintiff's house fell, Lord Tenterden said—"It may be true, that if my land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbour digs into his soil, so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight upon my land, it does not follow that he is to be deprived the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it." In a subsequent case,* it appeared that the plaintiff possessed an old house, which was proved to have stood for upwards of thirty-five years close to an old warehouse of the defendants; that the defendants pulled down their warehouse and made an excavation six feet deep, which came within four feet of the plaintiff's house; that after the excavation was made, the wall of the plaintiff's house bulged, and the defendants then endeavoured to shore it up, but unsuccessfully, and it fell down. Bolland, B., left it to the jury to say whether the fall of the plaintiff's house was occasioned by the defendants' negligence in making the excavation; and the jury found for the plaintiff. The Court of King's Bench refused to disturb the verdict (Lord Denman, Taunton and Williams, Js.), on the ground that the defendants had been guilty of

* *Dodd v. Holme*, 1 Ad. and El. 493. 3 Nev. and Man. 739.
See also *Partridge v. Scott*, 3 M. and W. 220.

negligence, independently of the right of easement of foundation ; and Littledale, J., on the ground that the plaintiff's house having stood for upwards of twenty years, the defendants had no right to disturb the foundations. The degree of care the defendants were bound to use, or what would amount to negligence, the Court did not define. It may be doubted whether they were bound to take any precautions against the plaintiff's house falling, assuming it not to be ancient, and that they could only be said to be guilty of negligence if they dug so deep into their land that plaintiff's land would have fallen away if the house had not been built thereon. The principle upon which Littledale, J., put the case is the more intelligible and definite. If my neighbour, by building on the verge of his land, acquires no right to the support of mine for the additional weight of his building, it is hard to understand why I should be bound to exercise more care in excavating my land than if his house had not been there.

Trower and Chadwick were the owners of adjoining walls and vaults, and Trower complained that Chadwick pulled down his vault and wall without giving Trower notice, and did not use due care, or take reasonable precautions, in the performance of the works, whereby Trower's vault and the wine in it was injured. The Court of Common Pleas held the action sustainable, on the ground that the duty to use due care and skill, and to take reasonable and proper precautions in the pulling down the vault and wall so as not to injure the tenant of adjoining vault, was clearly imposed

by law.^a The judgment was reversed by the Exchequer Chamber, because it was not the duty of the party pulling down his vault to give notice of his intention to his neighbour, and because it did not appear by the declaration that he was aware of the existence of the adjoining vault, and that if he did not know that there was an adjoining vault, he was not bound to use any care or take any precautions in pulling down his own. The Court appear to have doubted whether the mere circumstance of the proximity of buildings imposed any duty on a party pulling down to take precautions against injuring his neighbour's.^b

In *Bradbee v. Christ's Hospital*,^c one complaint was that the defendants conducted themselves so carelessly in pulling down their house, that bricks and mortar fell from their house into and upon the plaintiff's house, and broke his windows and skylights. The Court said that the case resembled *Dodd v. Holme* rather than *Chadwick v. Trower*, and that the plaintiff was entitled to recover damages. This was a clear case; the defendants' carelessness having caused something from their premises to encroach upon the plaintiff's: but in *Dodd v. Holme*, the grievance was that the defendant's want of caution had caused the building on the plaintiff's premises to fall away.

8. It is the duty of an occupier of land not merely not to do any act which will cause an encroachment on his neighbour's land, but also to take care

Neglects injurious to private Possessions. Non-repair of Partitions, &c.

^a *Trower v. Chadwick*, 3 Bing. N. C. 334.

^b *Chadwick v. Trower*, 6 Bing. N. C. 1.

^c 4 Man. and Grang. 714.

that nothing on his land which may encroach on his neighbour's shall do so to his injury.

Goldwin's privy adjoined Tenant's cellar. The soil burst through the wall into the cellar. It was decided that this was a nuisance, and that Goldwin was bound of common right to repair the wall of his cellar, so as to prevent the soil from injuring Tenant. Holt, C. J., said, "If a man erect a house, and the house of office adjoins to a vacant piece of ground which keeps in the filth, the owner of the vacant ground, if he will make a cellar, must build a wall to it."^a A. had an upper room, and B. a lower room: it was held that if A. neglected to cover his upper room, B. might have an action against him for the preservation of the timbers of his room, and that A. might have an action against B. if by his default the support of A.'s room was injured.^b This case was doubted by Holt, C. J., in *Tenant v. Goldwin*.

If the occupier of a house suffers it to be dilapidated so as to injure the adjoining house, he is liable to an action.^c If one has conduit pipes passing by the foundations of the house, and he neglects to repair them, whereby the house is injured, it is a nuisance.^d And if a parson neglects to carry away his tithe within a reasonable time after it has been set out, whereby the farmer's grass is rotted, he is liable to an action. He is bound to remove his tithe although he has no notice of the tithe having

^a *Tenant v. Goldwin*, 2 Lord Raym. 1089. 1 Salk. 360.

^b Keilway, 98 b.

^c F. N. B. 127 C. (295). *Taylor v. Stendall*, 7 Q. B. 634.

^d Com. Dig. Action on the Case for a Nuisance, F. 2.

been set out, unless it be the custom of the country to give him notice; in which case he is entitled to notice, the custom being reasonable.*

So a party having a water-course in his land is bound to cleanse it, at all events so as to prevent its becoming injurious to his neighbour; and is liable for an obstruction, although he has no notice of it.^b

The cases as to nuisances caused by fire have already been stated.^c

9. It has been contended that where a man encourages the breeding of animals on his land, which are destructive to his neighbours, such as coneyes, pigeons, or rooks, it is a nuisance. But this has been held to be no nuisance, Anderson, J., saying, "To have an action against one for damage done by savage and wild beasts wherein he hath not any interest, and it cannot be known whether they came out of his land, is unreasonable. And he who hath damage thereby may well kill them, and they may be said to be his coneyes when they are upon his lands."^d But where the lord of a manor overstocks the common land with coneyes, the commoner has no right to kill them on the ground that they stint his common.^e

Destructive
Animals.

* *Butter v. Heathby*, 3 Bur. 1891. *Facey v. Hurdorn*, 3 B. and C. 213.

^b *Bell v. Twentyman*, 1 Q. B. 766.

^c *Ante*, cap. 2, section 14.

^d *Bowlston v. Hardy*, Cro. El. 547. 5 Rep. 104 b. *Dewell v. Sanders*, Cro. Jac. 491. *Hinxley v. Wilkinson*, Cro. Car. 387.

^e *Miles v. Gresil*, Yelv. 104. *Cope v. Marshall*, 2 Wils. 51. 1 Bur. 259.

Easements,
how acquired.
By Grant;

10. An easement is a right which one man has to use the land of his neighbour for a special purpose. Such a right can only be acquired by grant or by prescription, which raises the presumption of a grant. An easement being incorporeal, a grant thereof must be by deed.^a Grants of easements are either express or implied. An express grant needs not observation; a grant of an easement is implied in the following case. If a man, having built a house upon his own land, conveys the house, he thereby impliedly grants the easement of light over his own land to the windows of the house, as it then stands, and neither he, nor any person claiming under him, can derogate from his grant, and build upon the adjoining land to the obstruction of the light.^b And, in like manner, if an unfinished house is granted with openings for the windows, or ground is leased upon condition that the lessee shall build thereon in a specified situation according to a certain plan, the grantor or lessor, or those claiming under him, cannot build upon the ground adjoining, so as to darken the windows of the house, when finished according to the plan.^c And if a house and the land adjoining are conveyed at the same time to different persons, and the land is described as building land, the purchaser of the land cannot build so as to obstruct the windows of the house, because it must be presumed that the easement of light was conveyed as appurtenant to

^a Wood v. Leadbitter, 13 M. and W. 838. Hewlins v. Shipham, 5 B. and C. 221.

^b Palmer v. Fletcher, 1 Lev. 122.

^c Compton v. Richards, 1 Price, 27.

the house, and the land was conveyed subject to such easement.^a

In *Palmer v. Fletcher*, Keeling said, "If the land were sold first, and the house afterwards, the vendor of the land might stop the windows." But Twisden said, "Though the land were sold first, and the house afterwards, the vendee of the land could not stop the windows in the hands of his vendor or his assignees;" and he cited a case so adjudged. And in a modern case,^b *Abbott, C. J.*, at *Nisi Prius*, ruled in conformity with the opinion of Twisden. And though it may be reasonable to presume that the party granted the land subject to the easements necessarily attached to the house, since he never could have intended to empower the vendee of the land to destroy the comforts and conveniences attached to his house, yet the difference taken by Keeling appears to be more consistent with the principle upon which *Palmer v. Fletcher* was decided, viz. that a man shall not be permitted to derogate from his own grant; for to claim an easement over the land granted, which he has not expressly reserved, is as much in derogation of his grant as to infringe upon an easement which he has only impliedly granted.

11. A prescriptive right to the easement of light By Prescrip-
tion. is acquired by twenty years' uninterrupted enjoyment, unless it appears that such enjoyment was had by some consent or agreement expressly given for that purpose by deed or writing.^c The enjoy-

^a *Swansborough v. Coventry*, 9 Bing. 305. Vide also *Coutts v. Gorham*, Moo. and Malk. 396.

^b *Riviere v. Bower*, 1 Ry. and Moo. 24.

^c 2 and 3 Wm. IV. c. 71, s. 3.

ment must be by a window or opening in a building, by which the claimant visibly appropriates the light flowing through such window to himself. By merely using an open space of ground as a timber-yard, no right to the light coming to that ground is gained, and no action can be maintained for an obstruction of light, though it may prejudice the plaintiff in carrying on his business.^a

A defeasible prescriptive right to any other easement, such as the right of support from a neighbour's land for the foundation of a house, or to a water-course, or the use of water, is acquired by an uninterrupted enjoyment for twenty years; that is, it cannot be defeated by proof that it had its origin at any time before that period; but if the prescription be extended to forty years, then it becomes indefeasible, unless it appear that the easement was enjoyed by consent expressly given for that purpose by deed or in writing.^b Where the owner of the land over which the easement is claimed is an infant, non compos mentis, or tenant for life, or where an action or suit is pending, and diligently prosecuted until abated by the death of any of the parties, the time during which any such disabilities continue, or such action is prosecuted, is excluded from the computation of the presumptive period of twenty years.^c But where the prescription has become indefeasible by a continuance for forty years, and in the case of the easement of light, where the period of twenty years constitutes an indefeasible prescription, these circumstances have no effect in extending

^a Roberts v. Macord, Moo. and Rob. 230.

^b 2 & 3 Wm. IV. c. 71, s. 2.

^c S. 6.

the prescription. Where the land over which a right of way, or water-course, or use of water is claimed, is held for life, or any term of years exceeding three, the time of the enjoyment of the water, &c., during the continuance of the estate for life or years, must be excluded in the computation of the exclusive period of forty years, if the claim be resisted by the reversioner within three years after the expiration of the particular estate.*

It has been doubted whether a prescription can be made for an easement of support from a neighbour's land for the foundation of a house, because it is said the mere forbearance of the neighbour to dig into his ground, and weaken the foundation of the house, affords no presumption of a grant on his part, and there is no acquiescence in the adverse enjoyment of the house-owner;† but the same argument might be urged against prescriptions for the use of light, since that may have been enjoyed for twenty years, merely because the owner of the neighbouring ground has forborne to build. The reason by which both rights may be supported is, that light and a foundation are so essential to a house, that it can hardly be presumed that a man would build on the verge of his land if he had no right to the support of his neighbour's land for the foundation, or make windows if he had no right to the light; and that after twenty years the law will excuse him from producing the deed by which such rights were granted.

* 2 & 3 Wm. IV. c. 71, s. 8.

† *Dodd v. Holme*, 1 Ad. and El. 493. But see *Stansell v. Jollard*, 1 S. N. P. 457, 11th edit.; *Wyatt v. Harrison*, 3 B. and Ad. 871; and per *Littledale, J.*, in *Dodd v. Holme*.

Prescription for
Foundation;

In *Stansell v. Jollard*,^a Lord Ellenborough held that where a man had built on the extremity of his soil, and enjoyed his building above twenty years, he had, in analogy to the rule as to lights, acquired a right to the support of his neighbour's soil, so that his neighbour could not dig so near as to remove the support. This has been confirmed by Parke, B., who ruled at *Nisi Prius*, that if the plaintiff has enjoyed the support of the land of the defendant for twenty years to keep up his house, and both parties knew of that support, the plaintiff had a right to it as an easement, and the defendant could not withdraw the support without being liable in damages for any injury occasioned thereby.^b

In *Partridge v. Scott*,^c the plaintiff had built a house on excavated land: it was held that he could not acquire a right to the foundation so as to prevent the defendant from excavating his land, to the injury of the house, until it had stood for twenty years on excavated land.

For Support
from Neigh-
bour's House.

In *Peyton v. Mayor of London*,^d the action was for negligently pulling down the house adjoining to the plaintiff's. It was contended, on behalf of the defendant, that the plaintiff could have no easement to have his house supported by that of the defendant, because it was impossible to prove how long the house had been so supported; and that there could be no acquiescence, since it would be very mischievous if the proprietor of a house, upon

^a Sel. N. P. 457, 11th edit.

^b *Hide v. Thornborough*, 2 Car. and Kir. 250. *Hilton v. Earl Granville*, 5 Q. B. 701.

^c 3 M. and W. 220.

^d 9 B. and C. 725.

discovering that of his neighbour to be out of the perpendicular, should be bound to bring an action to rebut the presumption of an easement; and if any easement could be presumed, it could only be to have the plaintiff's house supported by that of the defendant, so long as the defendant's house lasted,—it could not be of a grant that the defendant would support the plaintiff's house for ever. The Court decided the case on the ground that no right to an easement of support was alleged in the declaration. It seems that if houses have stood together for twenty years with a common party wall, whether the owners of the houses are tenants in common of the party wall, or whether half the party wall belongs to one owner and half to the other, such an easement may be presumed.^a The owner of one of the houses has no right to underpin any part of the party wall, not even his own half, to the injury of his neighbour's house.^b

The prescriptive period of twenty or of forty years must be the period next before the commencement of the action or suit in which the claim is brought into question.^c And, therefore, where a party brings an action for the obstruction of his light, he must prove that he has had the uninterrupted use of the light for the twenty years immediately preceding the action.

^a *Brown v. Windsor*, 1 C. and J. 20. *Trower v. Chadwick*, 3 Bing. N. C. 334. *Chadwick v. Trower*, 6 Bing. N. C. 1.

^b *Bradbee v. Christ's Hospital*, 4 M. and G. 714.

^c 2 & 3 Wm. IV. c. 71, s. 4. *Wright v. Williams*, 1 M. and W. 77. *Richards v. Fry*, 7 A. and E. 698. *Ward v. Robins*, 15 M. and W. 237.

Interruption of
Prescription.

12. The usage must have been uninterrupted; but no act or matter is deemed an interruption, unless it has been submitted to, and acquiesced in, for one year after the party interrupted has had notice thereof, and of the party making or authorizing the same to be made.^a Thus, if windows have existed for twenty years, an occasional obstruction will not affect the prescription;^b but if any such obstruction has continued unabated for a year, the prescription will be wholly destroyed. In like manner, if the owner of the house has pulled down his house, and not rebuilt it with windows in the same situation within a year, or has blocked up the windows for a year, his right will be gone;^c though a disuse of the right for a shorter period would not be an abandonment, so as to interrupt or destroy the prescription.^d

Alteration.

13. A prescription for the use of light may be destroyed by an alteration of the manner in which it is enjoyed, as by altering the size or situation of the apertures through which it is received.^e Thus, where a party, having the right to light, carried out the wall of his house, and made a bow window in the new wall, in the same elevation as the former one, it was held that the easement was gone, since he had no right to receive the light through the

^a 2 & 3 Wm. IV. c. 71, s. 4. *Wright v. Williams*, 1 M. and W. 77. *Richards v. Fry*, 7 A. and E. 698. *Ward v. Robins*, 15 M. and W. 237.

^b *Flight v. Thomas*, 11 A. and E. 688; 1 West, 671.

^c Vide *Moore v. Rawson*, 3 B. and C. 332.

^d Vide *Luttrell's case*, 4 Rep. 86. *Arlett v. Ellis*, 9 B. and C. 671. ^e *Garritt v. Sharpe*, 3 A. and E. 325; 4 N. and M. 834.

new window.^a But the enlargement of an ancient window will not of itself destroy the prescription, so as to entitle the owner of adjoining land to obstruct the passage of light into any part of the space occupied by the ancient window.^b And where a building, which had been a malt-house, was converted into a dwelling-house, Macdonald, C. B., ruled that it was still entitled to so much light as was sufficient for the purpose of making malt, though not to any greater quantity.^c And where a party was entitled to lights by means of blinds fronting a garden, and took away the blinds, and thereby opened an uninterrupted view into the garden, Lord Kenyon held that the proprietor of the garden was not justified in making an erection which diminished the light heretofore coming into the house through the blinds.^d

From *Garritt v. Sharpe*, it seems that in all these cases it is for the jury to say whether the nature of the aperture is essentially changed. Where there is a right to pen back water by means of a dam, and the dam is destroyed, the party has no right to erect another dam in a different situation.^e And where one has a right to ancient pits by the side of a rivulet, for the watering his meadows and cattle, and they are choked with mud, he may cleanse, but cannot enlarge them, or dig other

^a *Blanchard v. Bridges*, 4 A. and E. 176; 5 N. and M. 567.

^b *Chandler v. Thompson*, 3 Camp. 80. *East India Company v. Vincent*, 2 Atk. 83.

^c *Martin v. Goble*, 1 Camp. 322.

^d *Cotterell v. Griffiths*, 4 Esp. 69.

^e *Mason v. Hill*, 5 B. and Adol. 1; 2 Nev. and Man. 747.

pits.^a His making of other pits is not abandonment of his right to the old one.^b

Appendency of
Prescription.

14. A prescription for the use of light, water-course, &c., is annexed to the house itself, and not to the estate of freehold in the house, because such easements are so necessary to the convenient occupation of the house; and therefore it is that the prescription is not destroyed by an unity of the possession of the house to which it is annexed and the land over which it is claimed.^c Upon this principle the case of a party who builds a house upon his own land, and afterwards grants away the adjoining land, may be accounted for; in which case the grantee cannot build to the obstruction of the lights of the house, though such restriction upon the grantee in the use of the land, at first sight, appears to be in derogation of the grant. Yet if it is considered that the party, at the time he built the house, by the act of making the windows, annexed to the house the easement of light over his own land, and that such easement was appurtenant to the house itself at the time of the grant, and that the grant of adjoining land could not destroy such easement, it will be seen that there was no occasion expressly to reserve the right to the use of light, as there would have been if the right had no previous existence.

Nuisance to
Windows.

15. It only remains to be considered what acts are an encroachment on the easement of light. If

^a *Brown v. Best*, 1 Wils. 174.

^b *Hale v. Oldroyd*, 14 M. and W. 789.

^c *Beaudeley v. Brook*, Cro. Jac. 189. *Sherry v. Pigott*, 3 Bulst. 339. Poph. 165. *Symonds v. Seaborne*, Cro. Car. 325. *Drake v. Wigglesworth*, Willes, 654.

the building merely destroys the prospect, it is not actionable.^a The obstruction of light must be so great as to render the house to a sensible degree less fit for the purpose for which it was used before the obstruction. The plaintiff cannot bring an action for a nuisance merely because he has less light than before.^b

Where an Act of Parliament empowers a company to make a canal, an obligation is imposed upon the proprietors of the adjoining land not to excavate their land so as to injure the banks of the canal; but the canal proprietors must keep their banks in proper and substantial repair, and take every precaution to prevent the water from oozing through and undermining the banks. If, therefore, an injury happen to the canal, not merely in consequence of the adjoining landholder excavating his land, but conjointly by reason of his excavations and the imperfect banking of the canal, he is not liable. The easement of support from his land is only for such support as is necessary to a substantial bank.^c

Where surveyors of highways or commissioners of sewers dig under or near a party's house, they are bound to shore it up, and take all reasonable precautions, because as against them the party is entitled to the support of the neighbouring house or land.^d And in such case, or where a party is

^a Knowles v. Richardson, 1 Mod. 55. Per Wray, C. J., Aldred's case, 9 Rep. 58 b.

^b Back v. Stacey, 2 C. and P. 465. Parker v. Smith, 5 C. and P. 438.

^c Staffordshire and Worcestershire Canal Company v. Hallen, 6 B. and C. 317. 9 D. and R. 266.

^d Roberts v. Read, 16 East, 215. Jones v. Bird, 5 B. and Ald. 837.

entitled to the support of his neighbour's house or land, he is not, it seems, bound to take precautions when his neighbour pulls down his house or excavates his land.*

Public
Nuisances :
Obstruction of
Highway.

16. Every act or default of the occupier of tenements which causes an infringement of the public rights, or which is prejudicial, or even dangerous, to a whole neighbourhood, is deemed a public nuisance.

Thus an encroachment or obstruction of the public highway, by digging a ditch, or laying logs, or erecting a fence upon it, is a nuisance;^b and so setting a person to deliver hand-bills in the highway, whereby the public right of passage is greatly impeded, has been deemed a nuisance.^c And a waggoner who kept carts and waggons continually standing in the public streets before his warehouses for a long and unreasonable time, was held indictable.^d A coach-stand in the public street, if not properly authorized, is a public nuisance.^e A stage for rope-dancers, a common playhouse,^f a shooting-ground,^g an exhibition of wax effigies,^h which cause great numbers of idle persons and coaches to collect,

* *Walters v. Pfiel*, Moo. and Malk. 362.

^b 1 Hawk. P. C. c. 76, s. 144. 5 & 6 Wm. IV. c. 50, s. 73. *Mould v. Williams*, Dav. and Mer. 631. 5 Q. B. 469. *Morgan v. Leach*, 10 M. and W. 558.

^c *Rex v. Sarmon*, 1 Bur. 516.

^d *Rex v. Russell*, 6 East, 427.

^e *Rex v. Cross*, 3 Camp. 244.

^f *Betterton's case*, 5 Mod. 142. 1 Hawk. P. C. c. 75, s. 6. Skin. 625.

^g *Rex v. Moore*, 3 B. and Adol. 184.

^h *Rex v. Carlile*, 6 C. and P. 636.

to the inconvenience of the public, have been respectively held nuisances.

For a tradesman to unload his merchandise before his warehouse, although such act obstructs the free passage of the public, is not a nuisance, from the necessity of the case, provided he do not continue the obstruction for an unreasonable time.^a Sawing timber in the street, though solely for the purpose of enabling defendant to get it into his yard, is a nuisance, since there is no necessity for the performing that operation in the public street.^b

An encroachment upon a navigable river or port, by building a wharf or pier, by which the public right of navigation is impeded, is a nuisance. But it is not every building which encroaches on the water-way that is a nuisance; for if the embankment improve the navigation, by restraining the water within narrower bounds, and preventing it from running in shallows, it is not a nuisance.^c And so an erection which renders a port more secure, as the breakwater at Plymouth. In *Rex v. Russell*,^d it was held by Bayley and Holroyd, Js., against the opinion of Lord Tenterden, that if an erection conferred advantages on the public greater than the prejudice it caused by impeding the navigation, it was no nuisance. But this has been overruled;^e and it is now clear that a party cannot justify encroaching on the public right of navigation

^a 2 Rol. Abr. 137. 1 Hawk. P. C. c. 76, s. 145.

^b *Rex v. Jones*, 3 Camp. 230.

^c *Hale de Portibus Maris*, pt. 2, c. 7, p. 85. *Rex v. Lord Grosvenor*, 2 Stark. 511.

^d 6 B. and C. 566.

^e *Rex v. Ward*, 6 Nev. and Man. 38. 4 Ad. and El. 384.

on the ground that he confers on the public other rights more beneficial to them; for instance, additional facilities for landing. Whether one public right shall succumb to another public right is a question too wide and intricate for courts of justice to determine. The maxim, "*de minimis non curat lex*," applies to public nuisances; and, therefore, where it appeared by special verdict that the defendants had erected planking in a public harbour, which, in some extreme cases, rendered the harbour less secure, the Court held, that for consequences so slight, uncertain, and rare, they were not criminally responsible.^a

An impediment to a navigation occasioned by inevitable accident is not a nuisance. Thus, where a vessel is accidentally sunk in a river, the owner is not indictable.^b Nor is he bound to warn the public of the danger.^c He may be bound to give notice if the vessel has sunk in consequence of his fault, or if he has not abandoned his possession of it; and in such case should place a buoy over the wreck, such being the usual mode of warning vessels of an obstruction to the navigation.^d A canal company who receive tolls for the navigation of a canal are bound to take reasonable care to make the navigation secure; and if a barge sinks in the canal, they ought either to remove it, or place a signal over it, within a reasonable time.^e

^a *Rex v. Tindall*, 1 Nev. and Per. 719. 6 Ad. and El. 143.

^b *Rex v. Watts*, 2 Esp. 675.

^c *Brown v. Mallett*, 12 Jur. 204.

^d *Hammond v. Pearson*, 1 Camp. 515.

^e *Parnaby v. Lancaster Canal Company*, 11 Ad. and El. 223.

17. It is also a public nuisance if a party carry ^{Offensive Trade.} on an offensive trade, to the annoyance of the public, in the exercise of their rights, or of a whole neighbourhood; as if the trade of steeping sheep-skins, or making acid of sulphur, is carried on in a populous neighbourhood, or near a public highway.^a A gas company, who corrupted the water of a river, and rendered it unfit to drink, were held guilty of a nuisance, but not for destroying the fish, and thereby throwing fishermen out of employment.^b It should appear that the trade is to the common nuisance of the whole neighbourhood.^c An indictment against a tinman for making a noise in carrying on his trade, which only incommoded the inhabitants of three houses in Clifford's Inn, was held, by Lord Ellenborough, not sustainable.^d It does not seem essential to a public nuisance that any public right should be encroached upon or endangered, but a grievance which intrenches upon the private rights of a great number of individuals, is a public nuisance, as well as a private injury to each of the individuals affected, in order to obviate the necessity of bringing a multiplicity of actions.

18. If a person suffers his tenement to become ^{Dangerous Nuisance.} dangerous to the public, or exercises an occupation dangerous to health or life in a public situation, he is guilty of a nuisance. Thus, if the occupier of a house near a highway suffer it to become so dilapidated that it is likely to fall on the passengers, he is

^a *Rex v. Pappineau*, 1 Str. 186. *Rex v. White*, 1 Bur. 333.

^b *Rex v. Medley*, 6 Car. and Payne, 292.

^c *Vent.* 26. 3 Keb. 500.

^d *Rex v. Lloyd*, 4 Esp. 200.

indictable.^a And using a house in a city as an inoculating hospital for the small-pox,^b and manufacturing gunpowder in a populous place, have been held nuisances.^c The occupier of a house adjoining a highway having an area or trap-door in the pavement, is bound to fence off the area,^d and secure the trap-door, so that passengers shall not receive injury;^e and when he opens his trap-door for the purpose of getting at his cellar, he ought to conduct his business with such a degree of care as will prevent a person ordinarily careful from receiving any injury thereby.^f

Protection of
Premises by
Spring-guns,
&c.

19. It is enacted by the statute 7 & 8 Geo. IV. c. 18, s. 1, that if any person place any spring-gun, man-trap, or other engine calculated to do grievous bodily harm, with intent that the same, or whereby the same, may inflict grievous bodily harm on a trespasser, or person coming in contact therewith, he shall be guilty of a misdemeanour. It is provided, that it shall not be illegal to set guns or traps which have been usually set to destroy vermin, or spring-guns, man-traps, or other engines, from sunset to sunrise, in dwelling-houses, for the protection thereof. Before this statute it was much controverted as to what precautions a party might take to protect his land from trespassers: the better opinion was, that as the occupier of land had no

^a Regina v. Watts, 1 Salk. 367.

^b Rex v. Sutton, 4 Bur. 2116. Rex v. Vantandillo, 4 M. and S. 73.

^c 1 Russ. on Crimes, 431.

^d Coupland v. Hardingham, 3 Campb. 398. Barnes v. Ward, 2 C. and K. 661.

^e Daniels v. Porter, 4 C. and P. 262.

^f Proctor v. Harris, 4 C. and P. 337.

right to shoot or wound a mere trespasser; he could not set instruments on his ground which would produce that effect, according to the maxim, that a person shall not do indirectly what he has no right to do directly.* If he gave notice that spring-guns were set in his grounds, the party having notice could not complain of any injury sustained thereby, because such injury was of his own seeking, and the maxim applied, "*volenti non fit injuria*."^b In *Deane v. Clayton*,^c the Court of Common Pleas were equally divided in opinion as to whether a person was answerable for setting dog-spears in his lands, by which the plaintiff's dog chasing game was killed. This is a case not provided for by the statute. According to the above principle the land-owner was not justified, because he had no right to kill the dog, to preserve his game.^d There appears also a perfect right to set up spikes or broken glass upon the top of a wall, because such things are obvious to every body, and to a trespasser damaged by them the maxim, "*volenti non fit injuria*," applies. It has been held, also, that a party may keep a ferocious dog upon his premises at night for their protection, and that no action lies by a trespasser who is bitten by such dog.^e

20. Some acts are necessarily a nuisance to a neighbour, others are only so by reason of the in-

Nuisance
legalized
by Pre-occu-
pation;

* *Bird v. Holbrook*, 4 Bing. 628. 1 Moo. and Payne, 607.
Jay v. Whitfield, 4 Bing. 644 c.

^b *Ilott v. Wilkes*, 3 B. and Ald. 304.

^c 2 Marsh, 577. 1 Moo. 203. 7 Taunt. 489.

^d *Vere v. Lord Cawdor*, 11 East, 568.

^e *Brock v. Copeland*, 1 Esp. 203. *Sarch v. Blackburn*, Moo. and Malk. 505. 4 Car. and Payne, 297.

jurious consequences which ensue. Where John so builds his house as to overhang the house or land of Peter, the rain necessarily falls upon Peter's house or land, and the overhanging house of John forms an impediment to Peter building: but an offensive trade is not necessarily injurious to the occupier of the adjoining land, since, if the trade be not exercised so near his dwelling-house as to disturb him in its occupation, though the effluvia may penetrate the air over his land, he cannot complain of the nuisance, nor will his rights be varied if he afterwards choose to erect a dwelling-house in the immediate vicinity of the place where the trade is exercised. A party in setting up a trade need only have regard to the adjoining tenements as they are at the time he sets up his trade; and if at that time it is no annoyance to neighbouring occupiers, he may continue to carry it on in the same manner, though by subsequent alterations of the surrounding land, as by houses being built, it becomes injurious. This principle is illustrated by the before-cited instance of a cellar being made next to a house of office.* Where a man set up a noxious trade, remote from habitations and public roads; it was held that he might continue his trade, notwithstanding that new houses were erected, and new roads made near it.^b And if a house be erected in the neighbourhood of a pre-established offensive trade, the right to carry on such trade is annexed to the land, so that any succeeding occupier may carry it on in the same manner, since

* *Tenant v. Goldwin*, 2 Lord Raym. 1089. 1 Salk. 360.

^b *Rex v. Cross*, 2 Car. and Payne, 483.

by so doing he does not depreciate the value of the surrounding buildings, or diminish the enjoyment of the occupiers. Thus a butcher, brewer, &c., may carry on their trades in convenient places;^a and setting up a melting-house in a neighbourhood where noisome trades had been carried on for many years, is not a nuisance, unless it cause some additional annoyance to the neighbours.^b But if a man carry on a noxious trade in a place where it has been anciently established, in a manner more noxious than heretofore, he is liable for the annoyance he causes to the neighbours additional to that which he can justify by prescription or pre-occupation.^c

But that which is a nuisance at its commencement to the occupiers of houses in the neighbourhood, will not be less a nuisance to succeeding occupiers of the same houses, though they may have come into the neighbourhood after the nuisance was established there. Carrying on an offensive trade is a continual injury to the occupation of the houses adjoining; and every succeeding occupier will have all the rights of occupation, and may complain of their infraction, though those rights may have frequently been infringed in the time of his predecessor. And though it may be urged that he takes the house, knowing of the existence of the nuisance and "*volenti non fit injuria*," it may be answered that he may have taken the house knowing the nuisance to be wrongful, and relying on his right to abate

^a 2 Com. Dig. Action on the Case for Nuisance, C.

^b *Rex v. Neville, Peake*, 90.

^c *Rex v. Watt*, 1 Moo. and Malk. 281.

it; nor can it be presumed that he calculated upon the continuance of that which was wrongful.*

The mere continuance of a nuisance by a succeeding occupier of the land on which the nuisance exists, though the continuance be not by a repetition of acts similar to those done by his predecessor, but merely by permitting an erection to remain, which causes an annoyance to his neighbour—a building, for instance, which obstructs light—will render the occupier liable to an action. But in such case, in order to make the succeeding occupier liable, he should be requested to remove the nuisance.^b

By Licence; 21. That which is in its nature a nuisance may also become rightful by the grant or licence of the adjoining occupier, or by prescription.

The grant of an authority to do an act which would be otherwise a nuisance must be by deed. An authority so conferred is irrevocable, and the nuisance absolutely legalized. A licence is essentially revocable, and a parol authority to commit a nuisance cannot operate otherwise than as a licence. If the act of nuisance be done in pursuance of the licence, and before it is revoked, no action can be maintained by the licenser, or any person claiming under him, for the act or for its consequences; and where the act licensed is the obstruction of an easement, the licence

* *Elliotson v. Feetham*, 2 Bing. N. C. 134. See also *Penruddock's case*, 5 Rep. 100 b. *Beswick v. Camden Hill*, Cro. El. 402. *Westbourne v. Mordant*, Cro. El. 191. *Some v. Barwish*, Cro. Jac. 231.

^b *Penruddock's case*, 5 Rep. 100 b. *Baten's case*, 9 Rep. 55 a. *Ryppon v. Bowles*, Cro. Jac. 373. *Brent v. Haddon*, Cro. Jac. 555. *Rosewell v. Prior*, 2 Salk. 460.

may operate as an abandonment of the easement. Thus where Brockwell, by the licence of Winter, placed a skylight over an area on his premises, which prevented the light and air from coming to Winter's window, it was held that Winter could not maintain an action for the obstruction of the light.^a And where the plaintiff's father gave the defendant leave to lower the banks of a river and erect a wear, by which some of the water to which he was entitled for the purpose of working a mill was diverted, and afterwards finding that the acts licensed were injurious to his mill, called upon the defendant to restore the bank to its former state, the Court held that the defendant was not bound to restore the bank, and that the licence to divert the water operated pro tanto as an abandonment of the plaintiff's easement to receive it.^b

In *Perry v. Fitzhowe*,^c it was decided that a parol licence by a party entitled to a right of common, as appurtenant to a messuage, to encroach upon the common by building, was not binding on a subsequent owner of the same messuage, so as to prevent him from abating the building; the Court saying, that it was not necessary to consider what the effect of a parol licence would be against the person granting it. To an action for a nuisance, in setting up a smith's shop next to the plaintiff's house, it is no defence to plead that the defendant being a smith, the plaintiff advised him to dwell in the house and carry on his trade there.^d

^a *Winter v. Brockwell*, 8 East, 308.

^b *Liggins v. Inge*, 7 Bing. 682. 5 M. and P. 712.

^c 8 Q. B. 757.

^d *Bradley v. Gill*, 1 Lutw. 69.

But if the party complaining of an offensive trade has acquiesced in and encouraged the other to expend money in erecting buildings for the purpose of carrying it on, he may have an equitable right to carry on the trade against him, and the Court of Chancery may restrain an action for the nuisance.^a

By Pre-
scription ;

22. Some nuisances are legalized by prescription. Carrying on an offensive trade ceases to be a nuisance by a user for twenty years, the mere suffering of which by the neighbours is equivalent to a grant.^b

A right to divert water in a private stream may be acquired by twenty years' user as of right.^c

But if the nuisance claimed by prescription is totally destructive of the servient tenement, it is unreasonable and void. Thus a prescription to dig mines under ancient houses, to the injury of their foundations, is unreasonable and void.^d

By Statute.

23. A nuisance may be legalized by statute. Thus the 4th stat. of 25 Edw. III. c. 4, which provided that all wears in navigable rivers set up in the time of Edward I. and afterwards, should be destroyed, has been held to legalize wears erected before the time of Edward I.^e

Nuisances by
Public Autho-
rities, Com-
panies, &c.

24. Where an act is done in pursuance of a public authority, as by virtue of an Act of Parliament, or by trustees of roads, or commissioners of sewers acting within the scope of their authority and to

^a Williams v. Earl of Jersey, 1 Cr. and Ph. 91.

^b Elliotson v. Feetham, 2 Bing. N. C. 134. 1 Hodges, 259.
Rex v. Neville, Peake, 93. Flight v. Thomas, 10 A. and E. 590.

^c Ward v. Robins, 15 M. and W. 237.

^d Hilton v. Earl Granville, 5 Q. B. 701.

^e Williams v. Wilcox, 8 A. and E. 314.

the best of their skill, although it may inflict an injury on an individual, it is not a nuisance.

Thus, where commissioners empowered to raise and pave a street, raised it so high as to render the plaintiffs' gateway useless to them, it appeared that the raising the street was beneficial to the public, it was held that the plaintiffs had no right of action.^a And where the trustees for improving a road raised it so high by the plaintiff's pleasure-ground as to obstruct the entrance through his gates, and the gravel and stones fell into his grounds and injured his plantation, the decision was against the plaintiff.^b And where the trustees of a turnpike-road, in draining the road, diverted the water into plaintiff's ditches, so that it overflowed his fields, the Court held, that as they had been guilty of no excess of jurisdiction, but had informed themselves as well as they could by the opinion of their surveyor, they were not bound to compensate plaintiff.^c The commissioners of sewers, in making a sewer, injured the plaintiff's house: it appeared that the sewer was made in a workmanlike manner, by the process of tunnelling, which was the most expensive method of making it, and that it was beneficial to the public; that if it had been made by open cutting, the probability of the surrounding houses being injured would have been less, but that in no case could it be made without danger to those houses. The Court considered, that as the commissioners had acted to the best of their skill, and that, as it did

^a British Cast Plate Company v. Meredith, 4 D. and E. 794.

^b Boulton v. Crowther, 2 B. and C. 703.

^c Sutton v. Clarke, 6 Taunt. 29.

not appear that by the other method of making the sewer the injury to the plaintiff's house would have been avoided, they were not liable to an action.^a The Stockton and Darlington Company were empowered by Act of Parliament to make a railroad adjoining to a highway, and to use locomotive engines thereon: it was held that they were not indictable for a nuisance, because the engines frightened the horses travelling on the highway, and that it could not be implied that they should take effectual measures to screen their carriages from the highway, because it was, doubtless, considered by the Legislature that the public benefit derived from the railroad was more than equivalent to the public inconvenience occasioned thereby.^b

In all these cases the acts done were for the benefit of the public; and where the rights of the public and that of the individual clash, the right of the individual must succumb, the maxim being "*salus populi suprema lex est.*" And although it may be reasonable that the public should compensate the individual for the injury he has sustained, yet that is a question rather of policy for the Legislature, than of law for the Courts; and, at all events, cannot make public officers liable, as if they had done a wrong, when the act, which by law they are authorized and obliged to do, causes damage to an individual.

If public officers, or a public company, exceed

^a *Grocers' Company v. Donne*, 3 Bing. N.C. 34. 2 Hodges, 120.

^b *Rex v. Pease*, 4 B. and Ad. 30.

their authority,^a or act carelessly or negligently, and damage ensues to an individual in consequence of their act, they are liable to an action. And so if an individual sustain injury by reason of the omission of proper precautions by the public officers. Commissioners were empowered by Act of Parliament to repave and alter a street, in order to make a regular descent: they raised the pavement so high as to block up the doors and the lower windows of the plaintiff's house. The Court held that the powers of the commissioners must have a reasonable construction, and that the Legislature never could have intended that the inhabitants should pay a rate to have their houses buried in the ground, and their windows and doors obstructed.^b In *Roberts v. Read*,^c an action was maintained against surveyors of highways, because, in making some improvement in the street, they carelessly dug so near the plaintiff's wall that it fell down. And in *Jones v. Bird*,^d the commissioners of sewers were held liable to an action, because, in repairing the sewer under the plaintiff's house, they did not shore it up, by reason whereof a stack of chimneys fell down; and this, although there was contradictory evidence whether the shoring up would or would not have prevented the accident, the Court considering that they ought to have taken every precaution to prevent damage. In another case, where it appeared that an Act of Parliament gave parties power to lay rails along a highway, keeping the

^a *Turner v. Sheffield and Rotherham Railway Company*, 10 M. and W. 425.

^b *Leader v. Moxon*, 3 Wils. 461. 2 Bl. 924.

^c 16 East, 215.

^d 5 B. and Ald. 837.

road in repair for twenty feet each side of the railway, it was held that it was a nuisance to lay down rails where there was not twenty feet of highway on each side of the railway.^a And where the Hungerford Market Company had power to build over certain thoroughfares, opening new ways, it was held that they had no power to obstruct a thoroughfare by hoards, erected for the purposes of building, for an unreasonable time, and that an action lay against them by a shopkeeper injured by such obstruction.^b

Where commissioners do not exceed their authority, but an injury happens in consequence of the negligence of the persons employed by them, they are not liable; but the servants, who are guilty of the negligence, are. The maxim "respondeat superior" does not apply to persons acting in a public capacity, who merely order acts to be done, and who are not required personally to superintend the execution of their orders. Thus, where workmen, employed under trustees of a road, left a heap of rubbish in the road without lights, by reason whereof the plaintiff's wife fell over one of the heaps and broke her arm, it was held no action lay against the trustees.^c And where, in repairing a street, a ditch was dug, and a heap of rubbish placed in the street, without any guard or light

^a *Rex v. Morris*, 1 B. and Adol. 441.

^b *Wilkes v. Hungerford Market Company*, 2 Bing. N. C. 281. See also *Parnaby v. Lancaster Canal Company*, 11 A. and E. 223. *Aldridge v. Great Western Railway Company*, 3 M. and G. 515. *Pigot v. Eastern Counties Railway Company*, 3 C. B. 229.

^c *Harris v. Baker*, 4 M. and S. 27.

at night, and the plaintiff, riding along the street, fell into the ditch, and broke his thigh and injured his horse, it was held that no action could be maintained against the clerk of the trustees, but that the surveyor and contractor were liable, because it was the duty of the surveyor and contractor personally to superintend the repairs, to give orders as to securing the ditch, and to see that those orders were executed.^a This exception to the rule respondeat superior does not extend to a public company acting for their own profit.^b

25. A private nuisance may be abated by the party injured by it, provided he commits no riot in the abatement; but a public nuisance cannot be abated by an individual, unless he is specially inconvenienced thereby. Thus, if there is an obstruction in a river, and a party using the river can avoid it, he is bound to do so. He is liable if he wilfully or negligently run against it, to the injury of the party causing the obstruction.^c But where chimneys adjoining a highway were in danger of falling, it was held that firemen were justified in taking them down.^d

Remedies for
Nuisances :
Abatement.

When a building itself is a nuisance, it may be abated, as where a wall obstructs ancient lights, or a dam diverts water, the wall or the dam may be taken down.^e But if part of a house only is a

^a Hall v. Smith, 2 Bing. 156.

^b Allen v. Hayward, 5 Q. B. 968, n.

^c Mayor of Colchester v. Brooke, 7 Q. B. 339; but see Lodie v. Arnold, Salk, 458.

^d Dewey v. White, Moo. and Malk, 56.

^e Jenk. Cent. 260. Penruddock's case, 5 Rep. 100 b. Baten's case, 9 Rep. 55 a. Rex v. Rosewell, Salk. 459. Raikes v. Townshend, 2 Smith, 9.

nuisance, only so much as is a nuisance can be abated.^a And if the use to which the building is applied, and not the building itself, is a nuisance, as in the case of an offensive trade, the building cannot be abated.^b

If a dwelling-house is a nuisance, it cannot be abated whilst persons are actually occupying it, by reason of the risk of a breach of the peace.^c

Injunction.

The Court of Chancery will interfere, by injunction, to restrain a person from doing that which will be a permanent nuisance to his neighbour.^d This remedy may be had, although the act complained of is a public nuisance, if it occasions a private injury:^e but in such case the injunction is granted only in respect of the nuisance to the individual; and therefore, if several persons are injured by the same nuisance, they must institute separate suits to restrain it.^f

No injunction will be granted unless the act done or contemplated is or will clearly be a nuisance. Where parties were erecting works for the manufacture of gas by a new and secret process, which they said would cause no annoyance to their neighbours, an injunction was refused.^g An injunction was also refused where the defendants con-

^a James v. Hayward, Sir W. Jones, 221.

^b Rex v. Stead, 8 D. and E. 142.

^c Perry v. Fitzhowe, 8 Q. B. 757.

^d Attorney-General v. Johnson, 2 Wils. C. C. 87. Box v. Allen, 1 Dick. 49. Attorney-General v. Forbes, 2. Mylne v. Craig, 123.

^e Spencer v. London and Birmingham Railway Company, 8 Sim. 193. Sampson v. Smith, 8 Sim. 272.

^f Hudson v. Maddison, 12 Sim. 416.

^g Harries v. Taylor, 2 Phil. 209.

tended that they had a legal right to do the acts sought to be enjoined,—to dig mines to the injury of the foundations of the house.^a If a party sees a nuisance in progress, and does not interfere to prevent it, he will forfeit his right to assistance from a Court of Equity.^b

The party injured by a private nuisance may re- Action. cover a compensation in damages by an action on the case; but for a public nuisance no action lies at the suit of an individual, unless he has sustained some private and particular damage, otherwise there would be a multiplicity of suits, which the law disfavours.^c Thus, a party cannot maintain an action for the stoppage of a highway merely because he is prevented from passing along the way.^d But if he is interrupted in his business, and obliged to take a longer and more circuitous route to some place where he has occasion to go, at greater labour and expense, he may maintain an action.^e And thus, where the defendant had moored a barge across a creek, whereby the plaintiff was prevented from navigating his barge up the creek, and was obliged to carry his goods over land, it was held sufficient special damage.^f And where an obstruction was erected by defendant, and when plaintiff went to abate it, defendant prevented him, it was held that

^a *Hilton v. Earl Granville*, 1 Cr. and Phil. 283.

^b *Jones v. Royal Canal Company*, 2 Molloy, 319. *Williams v. Earl of Jersey*, 1 Cr. and Phil. 91.

^c *Williams's case*, 5 Rep. 72 b. *Fineux v. Hovendon*, Cro. El. 664.

^d *Pain v. Partrick*, 3 Mod. 289; Carth. 191.

^e *Hart v. Basset*, T. Jones, 156. *Greasley v. Codling*, 9 Moo. 489. *Wiggins v. Boddington*, 3 C. and P. 544.

^f *Rose v. Miles*, 4 M. and S. 101.

an action lay.^a Again, where a road leading to a coal mine was stopped up, by means whereof persons could not come to the plaintiff's mine to buy coals, and the plaintiff was prevented from selling them, Gould and Turton, Js., held that there was sufficient special damage to support an action; but Holt, C. J., and Rokeby, J., were of a contrary opinion. The case was referred to the Judges of the Court of Common Pleas and the Barons of the Exchequer, who all agreed that the action was sustainable.^b In a former case it had been held, that where plaintiff's houses were situate in a road leading to the river, the thoroughfare of which was blocked up, whereby his tenants left, and he lost the profits of his houses, an action might be maintained.^c And, in a recent case, where the Hungerford Market Company stopped up a public thoroughfare, by means whereof the plaintiff, a bookseller, was prejudiced in his trade, and had not so many customers as he had before the stoppage, the Court of Common Pleas decided that he had a right of action against the company.^d

If an obstruction is placed in a highway, and a party sustains an injury by falling over it, if such injury is occasioned by his own want of ordinary care in not avoiding the obstruction, no action lies: the injury may be said to result rather from his

^a *Chichester v. Lethbridge*, Willes, 71.

^b *Iveson v. Moore*, 1 Lord Raym. 486; 12 Mod. 262; Com. 58; Salk. 15; Willes, 74, n. *Rose v. Groves*, 5 M. and G. 613. *Dobson v. Blackmore*, 11 Jurist, 556.

^c *Baker v. Moore*, cited per Gould, J., 1 Lord Raym. 491.

^d *Wilkes v. Hungerford Market Company*, 2 Bing. N. C. 281.

own negligence, than from the act of the party placing the obstruction.^a

Where an injury happens in consequence of the dilapidated state of a public highway or bridge, which the inhabitants of the parish or county are bound to repair, no action lies, because the inhabitants of a parish or county are not a body sufficiently definite to be amenable to civil process.^b

An action may be maintained as well by the tenant of the lands injured, for the damage to his possession, as by the reversioner, for the damage to his reversion. To entitle the reversioner to maintain an action, the nuisance must be of so permanent a nature as to depreciate the value of his reversion, and it must be alleged and proved that it actually had that effect.^c It has been held that a reversioner can maintain no action for a mere trespass, though in assertion of a right of way over the land, because such acts can be no prejudice to him, and would not be evidence against him of the existence of the right.^d Nor is the temporary stoppage of a way to his house injurious to his reversion.^e But an erection to the obstruction of light is an injury to the reversioner, because the premises are thereby permanently lessened in

By whom:
Reversioner,
&c.;

^a *Butterfield v. Forrester*, 11 East, 60. *Flower v. Adam*, 2 Taunt. 314. *Marriott v. Stanley*, 1 M. and G. 568.

^b *Russell v. Men of Devon*, 2 D. and E. 667.

^c *Jackson v. Pesked*, 1 M. and S. 234.

^d *Baxter v. Taylor*, 4 B. and Adol. 72; 1 Nev. and Man. 14.

^e *Dobson v. Blackmore*, 11 Jur. 556. *Hopwood v. Schofield*, 2 Moo. and Rob. 34.

value.^a And where he has recovered in one action for such obstruction, he may maintain another for its continuance, because, it is said, the continuance of the obstruction renders the proof more difficult at a future time, notwithstanding the former recovery.^b And building a house with eaves and a spout which discharge rain-water on the plaintiff's premises may be injurious to his reversion.^c

To an action by a reversioner it is no answer that the nuisance was caused by the wrongful act or default of his tenant, unless indeed the default is one for which the owners of the land, to which the reversioner is entitled, are bound to guard against.^d

Tenant in
Common.

If the parties injured by a nuisance are tenants in common, they must join as plaintiffs, because the injury caused by a nuisance is personal, and concerns the profits of the land.^e

Against whom.

The occupier or person in possession of land is bound to take care that his land does not become a nuisance to his neighbours or to the public, and is liable if from defects of repair, or any acts done upon them by himself or his servants, or persons employed by him, another person is injured.^f But

^a *Jesser v. Gifford*, 4 Bur. 2141. *Shadwell v. Hutchinson*, Moo. and Malk. 350; 4 C. and P. 333.

^b *Shadwell v. Hutchinson*, 2 B. and Adol. 97.

^c *Tucker v. Newman*, 11 A. and E. 40.

^d *Lord Egremont v. Pulman*, Moo. and Malk. 404. *Bell v. Twentyman*, 1 Q. B. 766.

^e *Some v. Barwish*, Cro. Jac. 231.

^f *Regina v. Watts*, 1 Salk. 357. *Rider v. Smith*, 3 D. and E. 766. *Leslie v. Pound*, 4 Taunt. 649. *Bush v. Steinman*, 1 B. and P. 404. Per *Littledale, J.*, *Laugher v. Pointer*, 5 B and C.

the owner of land is not liable for a nuisance arising from a neglect to repair, unless he is under an obligation to repair; and it is doubtful whether in such case he is liable to a stranger.^a If a person lets land with that which is an actual nuisance upon it, such as a building which is an obstruction to light, or a privy which at the time of the letting is a nuisance, he is liable for the continuance of the nuisance, because by letting the land with the nuisance upon it he authorizes its continuance:^b but if at the time of the letting there is no actual nuisance on the premises, although they are so built that they probably may become a nuisance; as if a shop is let with a chimney so built that the smoke issuing therefrom will become injurious to the neighbours, the landlord is not liable, since the tenant may or may not use the chimney so as to become a nuisance.^c

A man is also liable for a nuisance caused by the negligent performance of works by himself or his servants, but not for the negligence of a person who is not his servant; as if one man contracts to do work and employs a sub-contractor, he is not liable for the negligence of the sub-contractor.^d But if one

547. *Randleson v. Murray*, 8 A. and E. 109. *Burgess v. Gray*, 1 C. B. 528.

^a *Russell v. Shenton*, 3 Q. B. 449. See *Payne v. Rogers*, 2 H. Bl. 349.

^b *Rosewell v. Prior*, 2 Salk. 460. 1 Ld. Raym. 713. *Rex v. Pedley*, 1 A. and E. 822.

^c *Rich v. Basterfield*, 4 C. B. 783.

^d *Wilson v. Peto*, 6 Moore, 47. *Witte v. Hague*, 2 D. and R. 33. *Rapson v. Cubitt*, 9 M. and W. 710. *Allen v. Hayward*, 7 Q. B. 960.

man employs another to do an act which is a nuisance, or exercises a control over an act which is in itself a nuisance, as an obstruction of a highway, he is liable, though the nuisance was not committed by himself or his servant.^a

Indictment.

The party guilty of a public nuisance may also be prosecuted by indictment, upon which he will be fined and imprisoned, and judgment given to abate the nuisance. But if the building is only a nuisance by reason of the use to which it is applied, there will be no judgment of abatement, because it may not continue a nuisance.^b If it does not appear, upon the face of the proceedings, that the nuisance is continuing,^c or if it appear that the nuisance has ceased before judgment, it will not be ordered to be abated.^d Where the nuisance is caused by the improper construction of furnaces near the highway, the Court may order the furnace to be altered, if thereby the grievance will be remedied.^e

There are many nuisances specified by the Highway Act, Building Act, and other statutes, for which proceedings may be taken before justices of the peace; but to enumerate them would carry me into too wide a field.

The party liable for public nuisances arising from the misuser or dilapidation of the premises is the occupier. Thus, if a house on the side of a highway is so dilapidated as to be dangerous to the passengers, the occupier may be indicted.^f And he is not only

^a *Burgess v. Gray*, 1 C. B. 578. ^b *Rex v. Pappineau*, 1 Str. 686.

^c *Rex v. Stead*, 8 D. and E. 142.

^d *Rex v. Incedon*, 13 East, 164.

^e 1 and 2 Geo. IV. c. 41. ^f *Regina v. Watts*, 1 Salk. 367.

criminally responsible for nuisances which he directly causes or encourages, but also for all the natural and probable consequences of his acts, though they happen without his concurrence, and even against his will. Thus, where a man used his premises near a highway as a shooting-ground, and the consequence was, that persons assembled outside to shoot the stray pigeons, to the annoyance and danger of the passengers, he was held indictable, as having caused such assembly, though it was urged that he had no control over the multitude outside; and they were, in fact, a prejudice to him, and he endeavoured to keep them away.^a On the same principle, a landlord who had demised tenements with a nuisance upon them, and made no provision for its discontinuance or reparation by the tenant, was held liable to be indicted.^b

ADDENDA TO CHAP. I. s. 5, p. 5.

SINCE the first sheets of this work were printed, it has been decided in the case of *Mason v. Lambert*,^c that a perpetual curate who is not removeable by his patron at pleasure, and who holds a house or buildings in right of his curacy, is liable for dilapidations in the same manner as any other incumbent.

The declaration stated the custom to be that all rectors, vicars, and other incumbents of ecclesiastical livings and benefices, not being incumbents

^a *Rex v. Moore*, 3 B. and Ad. 184.

^b *Rex v. Pedley*, 3 Nev. and Man. 627. 1 A. and E. 822.

^c 12 Jurist, 1045; 17 Law Journ. 366. Q. B. July 12, 1848.

removeable at the will and pleasure of the patrons and donors of such livings and benefices, whereunto do belong any house or houses, are bound and ought to repair, support, and sustain all and singular the houses and other buildings of and belonging to their respective rectories, vicarages, or other ecclesiastical livings or benefices, and to leave the same so repaired, supported, and sustained to their successor.

It was contended by Joseph Addison, for the defendant, that perpetual curates were not liable, because they had their origin within time of legal memory by statute 4 Hen. IV. c. 12, and therefore could not be included within an immemorial custom, because they had no freehold unless augmented by Queen Anne's Bounty, and because the appropriator or patron was liable for repairs in the Ecclesiastical Court, for which the Constitution of Othobon, cited in 1 Gibs. Cod. tit. 30, c. 13, was referred to.

The Court held that the custom, being the common law, would extend to a new case, if within its principle, though not within the words in which it was usually stated. Also that a perpetual curate might be brought within the words of the custom, as a species of vicar. They also decided that a seisin and freehold estate was not essential to render an incumbent liable for dilapidations, but that the obligation to repair was imposed upon every incumbent who had the occupation and enjoyment of the buildings: that the passage in Gibson did not refer to the houses of vicars and curates, but to the old rectorial mansions in which the bishops and

other superiors had been and were still to be officially received. They observed upon *Brown v. Ramsden*,^a that the vicar alleged that he was seised of buildings in right of his vicarage, and it appeared that they were copyhold, held by the Master and Fellows of a college, in trust, to receive the rents, and, after discharging out-goings, to pay the balance to the vicar; and upon *Pawly v. Wiseman*,^b that it proceeded entirely upon the assumption that the curate was removeable at the will of the patron.

^a Ante, p. 11.

^b Ante, p. 5.

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